Tan Keng Yong @ Tan Keng Hong & Anor v Tan Hwa Ling @ Tan Siew Leng & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-02(NCVC)(W)-199–02 OF 2020
HAS ZANAH MEHAT, CHE MOHD RUZIMA AND HASHIM HAMZAH JJCA
25 JANUARY 2022

Civil Procedure — Pleadings — Findings on matters not pleaded — Whether learned judicial commissioner erred in allowing respondents' claim based on resulting trust or alternatively constructive trust when respondents' pleadings were based on express and implied trust

Evidence — Burden of proof — Shifting of — Whether learned judicial commissioner erred in shifting evidential burden to appellants when respondents failed to discharge legal burden of proving their case on resulting trust and constructive trust — Whether adverse inference ought to be drawn against appellants for non-calling of witnesses

Limitation — Doctrine of laches — Delay in filing action — Respondents discovered about trust over deceased father's assets much earlier but filed action against appellant half a century later — Whether doctrine of laches applicable

Trusts and Trustees — Trusts — Existence of — Resulting trust and constructive trust — Disputes between siblings over assets of deceased parents — Whether resulting trust or alternatively constructive trust was established

The appellants and the respondents were siblings. The dispute between the parties was in relation to the assets of their late father ('PTK'), inter alia, immovable properties ('the disputed properties') and family companies known as Hong Meng Sdn Bhd and THH Holdings. PTK had transferred the said assets to either his wife ('CMS') or the first appellant ('D1') before his death. Approximately two and a half years later, CMS passed away as well and before her death, she had transferred the said assets either to D1 or the second appellant ('D2'). At the High Court, the learned judicial commissioner ('the JC') had adjudged and declared that the appellants held the portion of the assets derived from PTK on resulting trust and/or constructive trust for the respondents and further ordered: (a) that the shares of Hong Meng Sdn Bhd to be equally apportioned and transferred in equal shares of 20% per sibling; (b) that the appellants held the disputed properties on trust on behalf of the

respondents; (c) mandatory injunction against the appellants to transfer the disputed properties in equal shares of 20% per sibling; (d) that D1 to give account and to return the proceed of the 1/5 of the Skudai Land amounting to RM1,482,000 to Hong Meng Sdn Bhd; (e) that that appellants to pay back the advances of RM300,000 and RM350,000 taken from Hong Meng Sdn Bhd; and (f) that the appellants to pay cost of RM25,000 to the respondents together with the allocator fee of RM1,000 ('the decision'). Aggrieved by the decision, the appellants filed the present appeal. The appellants submitted that: (i) the JC's decision was not in accordance with the pleadings: (A) the respondents' pleadings were based on express or implied trust but the JC allowed the respondents' claim based on resulting trust or alternatively constructive trust; and (B) there were submissions of the respondents which were not pleaded in the respondents' pleadings ('the first issue'); (ii) the respondents failed to provide direct or indirect evidence of a clear and unequivocal intention to create trust, as such, the JC erred in law for shifting the evidential burden on the appellants even though the respondents failed to discharge their primary initial burden of proving their case ('the second issue'); (iii) the JC erred in law in drawing an adverse inference against the appellants for failing to call D2 and the lawyer who did the transfers to testify because the respondents were at liberty to call the said witnesses to impugn the transfers and to prove their case ('the third issue'); and (iv) the respondents admitted that they discovered the alleged breaches since 1970, and particularly in 2005 when the second respondent ('P2') had asked D1 for financial help but the JC dismissed the laches defence on the basis of incidents occurred in 2016 to 2018 ('the fourth issue'). The respondents submitted, inter alia, that: (1) CMS was a beneficiary as well as a trustee holding the assets in trust for the benefit of the parties; and (2) there was an admission by D1 via an email dated 3 March 2017 to the first respondent ('P1') to the effect that one of the properties known as Saleng Land was held on trust.

Held, allowing the appeal, and setting aside the High Court's judgment with costs of RM40,000 here and below to the appellants to be paid by the respondents subject to allocator:

(1) The initial burden to prove that Hong Meng Sdn Bhd and the disputed properties owned by the appellants were trust properties was on the respondents (as the plaintiffs in the court below). If they succeeded, then the burden shifted to the appellants (as the defendants in the court below) to disprove it. Based on the respondents' testimonies, the respondents could not prove that there was either an express trust or implied trust created by PTK or subsequently by CMS. The respondents failed to fulfil the first requirement, that was the certainty of the words used. None of the respondents was able to testify the exact words uttered by PTK or CMS to create a trust. Thus, the fundamental requirement for the creation of trust was not satisfied (see paras 41–42, 48 & 51).

(2) The respondents' pleaded case on the existence of a trust contradicted their action taken before the trial and their testimonies given in the court. The respondents could not claim that the transfer of the disputed properties was subject to a trust but at the same time claiming that PTK had intention to bequeath the disputed properties through a will. On the same note, if the transfer of the disputed properties were tainted with fraud or forgery, it was illogical to suggest that PTK had at the same time intended to create a trust for the disputed properties. Therefore, the respondents failed to prove their case based on express or implied trust (see paras 52 & 54).

(3) In the present case, the respondents claimed that the appellants were their trustee as opposed to be a trustee for PTK or CMS as in the case of resulting trust. The respondents failed to fulfil the requirement to enable the JC to presume that the resulting trust existed. The material evidence adduced by the respondents showed that there was an express intention by PTK to transfer the disputed properties to CMS, in order to avoid heavy estate duty. Then, by the same reason, CMS transferred the disputed properties to the appellants. Based on these findings, the respondents failed to establish their claim based on resulting trust (see paras 63–65).

(4) It was trite law that parties bound by their pleadings. The respondents' claim was based on a direct trust and there were no specific particulars of facts which would support a case of constructive trust. Merely praying for a declaratory and consequential relief as a remedy in the statement of claim without particularising the material facts to support a claim on constructive trust was insufficient to fulfil the requirement of the law on pleadings. Further, the parties could not rely on the agreed issues to be tried to establish or to prove their case. Agreed issue or issues could not circumvent any shortcoming in the pleadings. Finally, there was also no clear and unequivocal evidence to support the establishment of a constructive trust especially when there was an outright transfer of property from PTK to CMS or to the appellants (see paras 70 & 72–75).

(5) The respondents via the second respondent had abandoned their claim on the issue of fraud and the counsel for the respondents had reaffirmed the respondents' stand that they were not disputing the transfer of the disputed properties from PTK to CMS or to the appellants. Thus, it was correct to say that the transfer of the disputed properties were properly executed and therefore valid. Consequently, the appellants had an indefeasible title to the disputed properties under the National Land Code (see para 76).

(6) In relation to the respondents' averment that CMS was a beneficiary as well as trustee, the contemporaneous conduct of CMS when the alleged trust was purportedly created up to the time when she passed away in

1973 did not reflect the fact that she was a trustee. If CMS held the properties on trust, there was no need for her to restart the alleged scheme devised by PTK to avoid the estate duty. Further, as a trustee, CMS could have distributed the assets equally amongst her children after PTK passed away, but in the present case CMS had held the properties for three years since PTK passed away. From CMS's conduct, the only inference that could be made was that the transfer of the assets by the CMS was an outright inter vivos gift, and not subject to a trust as alleged by the respondents (see paras 77–78).

(7) The alleged admission by D1 could not be considered as prima facie proof to corroborate the respondents' claim on the existence of trust. This was because, in the true contacts of the said statement, D1 referred to the Saleng Land, a property owned by the second appellant, not his own property. Therefore, D1 was not in the position to suggest that Saleng Land was a trust property. To conclude on the respondents' claim for constructive trust, the court held that based on the respondents' pleaded facts and the evidence adduced, the JC had erred in law and in fact when she made a finding that the respondents had proven their case on a constructive trust (see paras 81–82).

(8) The JC failed to take into consideration the fact that the respondents had not proven their case against the appellants in staking a claim for the shares of Hong Meng Sdn Bhd. No facts and particulars were pleaded to support the respondents' contention that Hong Meng Sdn Bhd was legally a family company. Further, it was trite that a company was a separate legal entity, distinct from its shareholders or directors. The ownership of a company limited by shares was determined by its shareholding and not by other means. From the undisputed fact, the appellants were the only contributories of Hong Meng Sdn Bhd. Thus, there was no reason for the JC to make an order to apportion Hong Meng Sdn Bhd in five equal shares among the siblings. In relation to the refund of the proceed of Skudai Land by D1 and the refund of the two advances order by the JC, the JC had committed a fundamental flaw when she disregarded the provisions in the Companies Act 2016 and the established principles of company law that if there was any wrong committed against the company, only the company could initiate an action to redress the wrongdoing. Therefore, the respondents who were alien to Hong Meng Sdn Bhd had no locus standi to bring any action on behalf of the company (see paras 86–88).

(9) Based on the pleaded facts and the evidence adduced by the respondents, the respondents failed to discharge the legal burden to prove the existence of any relevant facts to show that the disputed properties were trust properties and the appellants were their trustees. Thus, the evidential burden had not yet shifted to the appellants to adduce rebutting

evidence. Based on this finding, the court answered the first issue and the second issue in favour of the appellants. In relation to the third issue, based on the above finding, the court held that the JC was plainly wrong in her approach to draw an adverse inference against the appellants for the non-production of D2 and the lawyer. The JC had disregarded the important principles of evidence law, that was the law on the burden of proof especially in cases when trust was sought to be established. An adverse inference could only be drawn if the respondents (as the plaintiffs in the court below) had successfully established their case and if the appellants (as the defendants in the court below) failed to call relevant witness or witnesses to rebut the respondents' established case (see paras 89–91).

(10) According to the pleaded facts, the respondents knew about the existence of the alleged trust over the disputed properties since they were transferred either to CMS or the appellants circa in 1970. The respondents in their testimonies also acknowledged the fact that they knew about the trust long before they filed the action against the appellants. However, the respondents did not take any action whether to file an action or even to lodge a caveat to secure their claim over the disputed properties. The respondents had slept upon their rights and acquiesced for a great length of time. It was unjust to consider the respondents' claim for a remedy where they had by their own conduct might fairly be regarded as equivalent to a waiver or an estoppel. The injustice caused to the appellants could not be gainsaid. Therefore, the JC's finding on the defence of laches was erroneous. Even if the respondents succeeded in proving their claim, the respondents still failed to overcome the hurdle of the doctrine of laches (see paras 92, 94 & 97–99).

[Bahasa Malaysia summary

Perayu-perayu dan responden-responden adalah adik-beradik. Pertikaian antara pihak-pihak adalah berhubung dengan aset arwah bapa mereka ('PTK'), antara lain, harta tak alih ('harta yang dipertikaikan') dan syarikat-syarikat keluarga dikenali sebagai Hong Meng Sdn Bhd dan THH Holdings. PTK telah memindahkan aset tersebut kepada isterinya ('CMS') atau perayu pertama ('D1') sebelum kematiannya. Kira-kira dua setengah tahun kemudian, CMS juga meninggal dunia dan sebelum kematiannya, dia telah memindahkan aset tersebut sama ada kepada D1 atau perayu kedua ('D2'). Di Mahkamah Tinggi, pesuruhjaya kehakiman yang bijaksana ('PK') telah memutuskan dan mengisytiharkan bahawa perayu-perayu memegang bahagian aset yang diperoleh daripada PTK atas amanah yang terhasil dan/atau amanah konstruktif bagi pihak responden-responden dan seterusnya memerintahkan: (a) bahawa saham Hong Meng Sdn Bhd untuk dibahagikan sama rata dan dipindahkan dalam jumlah pegangan yang sama sebanyak 20%

saham bagi setiap adik-beradik; (b) bahawa perayu-perayu memegang harta yang dipertikaikan atas amanah bagi pihak responden-responden; (c) injunksi mandatori terhadap perayu-perayu untuk memindahkan harta yang dipertikaikan dalam pegangan saham yang sama banyak iaitu 20% bagi setiap adik beradik; (d) agar D1 memberi akaun dan mengembalikan hasil daripada jualan 1/5 daripada Tanah Skudai berjumlah RM1,482,000 kepada Hong Meng Sdn Bhd; (e) bahawa perayu-perayu membayar balik wang pendahuluan sebanyak RM300,000 dan RM350,000 yang diambil daripada Hong Meng Sdn Bhd; dan (f) bahawa perayu-perayu membayar kos sebanyak RM25,000 kepada responden-responden bersama-sama dengan yuran alokator sebanyak RM1,000 ('keputusan tersebut'). Terkilan dengan keputusan tersebut, perayu-perayu memfailkan rayuan semasa. Perayu-perayu berhujah bahawa: (i) keputusan PK tidak mengikut pliding: (A) pliding responden-responden adalah berdasarkan amanah nyata atau tersirat tetapi PK membenarkan tuntutan responden-responden berdasarkan amanah yang terhasil atau secara alternatifnya amanah konstruktif; dan (B) terdapat hujahan responden-responden yang tidak diplid dalam pliding responden-responden ('isu pertama'): (ii) responden-responden gagal memberikan keterangan langsung atau tidak langsung tentang niat yang jelas dan tidak berbelah bahagi untuk mewujudkan amanah, oleh itu, PK telah terkhilaf dari segi undang-undang kerana mengalihkan beban pembuktian ke atas perayu-perayu walaupun responden-responden gagal melepaskan beban awal mereka untuk membuktikan kes mereka ('isu kedua'); (iii) PK terkhilaf dalam undang-undang dalam membuat inferens bertentangan terhadap perayu-perayu kerana gagal memanggil D2 dan peguam yang menguruskan pemindahan untuk memberi keterangan kerana responden-responden bebas memanggil saksi-saksi tersebut untuk menafikan pemindahan dan membuktikan kes mereka ('isu ketiga'); dan (iv) responden-responden mengakui bahawa mereka mengetahui tentang pelanggaran tersebut sejak 1970, dan khususnya pada tahun 2005 apabila responden kedua ('P2') telah meminta bantuan kewangan daripada D1 tetapi PK menolak pembelaan laches berdasarkan insiden yang berlaku pada 2016 hingga 2018 ('isu keempat'). Responden-responden berhujah, antara lain, bahawa: (1) CMS adalah benefisiari serta pemegang amanah yang memegang aset secara amanah untuk manfaat pihak-pihak; dan (2) terdapat pengakuan oleh D1 melalui emel bertarikh 3 Mac 2017 kepada responden pertama ('P1') yang menggambarkan bahawa salah satu hartanah yang dikenali sebagai Tanah Saleng adalah dipegang secara amanah.

Diputuskan, membenarkan rayuan dan mengenepikan penghakiman Mahkamah Tinggi dengan kos RM40,000 di sini dan di bawah dibayar oleh responden-responden kepada perayu-perayu tertakluk kepada alokator:

(1) Beban awal untuk membuktikan bahawa Hong Meng Sdn Bhd dan harta yang dipertikaikan yang dimiliki oleh perayu-perayu adalah harta

amanah adalah di pihak responden-responden (sebagai plaintif-plaintif di Mahkamah Tinggi). Sekiranya mereka berjaya, maka beban tersebut beralih kepada perayu-perayu (sebagai defendan-defendan di Mahkamah Tinggi) untuk menafikannya. Berdasarkan keterangan responden-responden, responden-responden tidak dapat membuktikan sama ada terdapat amanah nyata atau amanah tersirat yang dibuat oleh PTK atau seterusnya oleh CMS. Responden-responden gagal memenuhi syarat pertama iaitu kepastian perkataan yang digunakan. Tiada seorang pun daripada responden-responden yang dapat memberi keterangan dengan tepat berkenaan perkataan yang diucapkan oleh PTK atau CMS untuk mewujudkan amanah. Oleh itu, syarat asas untuk mewujudkan amanah tidak dipenuhi (lihat perenggan 41–42, 48 & 51).

(2) Kes yang diplidkan oleh responden-responden mengenai kewujudan amanah bercanggah dengan tindakan mereka yang diambil sebelum perbicaraan dan keterangan yang mereka berikan di mahkamah. Responden-responden tidak boleh mendakwa pemindahan harta yang dipertikaikan tersebut tertakluk kepada amanah tetapi pada masa yang sama mendakwa PTK mempunyai niat untuk mewasiatkan harta yang dipertikaikan tersebut melalui wasiat. Berhubung dengan ini, jika pemindahan harta yang dipertikaikan dicemari dengan penipuan atau pemalsuan, adalah tidak logik untuk mencadangkan bahawa PTK pada masa yang sama berhasrat untuk mewujudkan amanah bagi harta yang dipertikaikan tersebut. Oleh itu, responden-responden gagal membuktikan kes mereka berdasarkan amanah nyata atau tersirat (lihat perenggan 52 & 54).

(3) Dalam kes ini, responden-responden mendakwa bahawa perayu-perayu adalah pemegang amanah bagi pihak mereka dan bukan pemegang amanah untuk PTK atau CMS seperti dalam kes amanah yang terhasil. Responden-responden gagal memenuhi keperluan untuk membolehkan PK membuat anggapan bahawa amanah yang terhasil telah dibuktikan. Keterangan material yang dikemukakan oleh responden-responden menunjukkan bahawa terdapat hasrat nyata oleh PTK untuk memindahkan hartanah yang dipertikaikan tersebut kepada CMS bagi mengelakkan cukai harta pusaka yang tinggi. Kemudian, atas sebab yang sama, CMS memindahkan harta yang dipertikaikan tersebut kepada perayu-perayu. Berdasarkan dapatan-dapatan ini, responden-responden gagal membuktikan tuntutan mereka berdasarkan amanah yang terhasil (lihat perenggan 63–65).

(4) Telah menjadi undang-undang yang mantap bahawa pihak-pihak adalah terikat dengan pliding mereka. Tuntutan responden-responden adalah berdasarkan amanah langsung dan tiada butiran fakta khusus yang menyokong kes amanah konstruktif. Sekadar memplid untuk pengisytiharan dan relif-relif berbangkit sebagai remedi dalam

pernyataan tuntutan tanpa mengkhususkan fakta material untuk menyokong tuntutan berkenaan amanah konstruktif adalah tidak mencukupi untuk memenuhi keperluan undang-undang mengenai pliding. Selanjutnya, pihak-pihak tidak boleh bergantung pada isu yang dipersetujui untuk dibicarakan untuk membuktikan kes mereka. Isu atau isu-isu yang dipersetujui tidak boleh mengatasi kekurangan dalam pliding. Akhir sekali, tiada juga keterangan yang jelas dan muktamad untuk menyokong pengwujudan amanah konstruktif terutamanya apabila berlaku pemindahan harta secara langsung daripada PTK kepada CMS atau kepada perayu-perayu (lihat perenggan 70 & 72–75).

(5) Responden-responden melalui responden kedua telah meninggalkan tuntutan mereka dalam isu penipuan dan peguam untuk responden-responden telah mengesahkan pendirian responden-responden bahawa mereka tidak mempertikaikan pemindahan harta yang dipertikaikan tersebut daripada PTK kepada CMS atau kepada perayu-perayu. Oleh itu, adalah betul untuk mengatakan bahawa pemindahan harta yang dipertikaikan tersebut telah dilaksanakan dengan betul dan sah. Akibatnya, perayu-perayu mempunyai hakmilik yang tidak boleh disangkal ke atas hartanah yang dipertikaikan tersebut di bawah Kanun Tanah Negara (lihat perenggan 76).

(6) Berkaitan dengan hujahan-hujahan responden-responden bahawa CMS adalah benefisiari dan juga pemegang amanah, tingkahlaku CMS semasa amanah yang dikatakan tersebut diwujudkan sehingga masa beliau meninggal dunia pada tahun 1973 tidak menggambarkan hakikat bahawa beliau adalah seorang pemegang amanah. Jika CMS memegang harta tersebut secara amanah, dia tidak perlu memulakan semula skim yang didakwa direka oleh PTK untuk mengelakkan cukai harta pusaka. Tambahan pula, sebagai pemegang amanah, CMS boleh mengagihkan aset tersebut secara sama rata kepada anak-anaknya selepas PTK meninggal dunia, tetapi dalam kes ini CMS telah memegang hartanah tersebut selama tiga tahun sejak PTK meninggal dunia. Daripada tingkah laku CMS, satu-satunya inferens yang boleh dibuat ialah pemindahan aset oleh CMS adalah hadiah inter vivos yang dibuat secara langsung dan tidak tertakluk kepada amanah seperti yang didakwa oleh responden-responden (lihat perenggan 77–78).

(7) Dakwaan pengakuan oleh D1 tidak boleh dianggap sebagai bukti prima facie untuk menyokong kes responden-responden mengenai kewujudan amanah. Ini kerana, dalam tafsiran sebenar kenyataan tersebut, D1 merujuk kepada Tanah Saleng, harta yang dimiliki oleh perayu kedua, bukan hartanya sendiri. Oleh itu, D1 tidak berada dalam kedudukan untuk mencadangkan bahawa Tanah Saleng adalah harta amanah. Untuk membuat kesimpulan mengenai tuntutan amanah konstruktif oleh

responden-responden, mahkamah memutuskan bahawa berdasarkan fakta-fakta yang diplidkan oleh responden-responden dan keterangan yang dikemukakan, PK telah terkhilaf dari segi undang-undang dan fakta apabila beliau membuat keputusan bahawa responden-responden telah membuktikan kes mereka berkenaan dengan amanah konstruktif (lihat perenggan 81–82).

(8) Pesuruhjaya kehakiman gagal untuk mengambil kira fakta bahawa responden-responden gagal membuktikan kes mereka terhadap perayu-perayu dalam mengemukakan tuntutan bagi saham Hong Meng Sdn Bhd. Tiada fakta dan butiran yang diplidkan untuk menyokong dakwaan responden-responden bahawa Hong Meng Sdn Bhd adalah syarikat keluarga yang sah. Tambahan pula, sudah menjadi undang-undang yang mantap bahawa syarikat adalah entiti undang-undang yang berasingan, berbeza daripada pemegang-pemegang saham atau pengarah-pengarahnya. Pemilikan bagi syarikat yang dihadkan oleh saham ditentukan oleh pegangan sahamnya dan bukan dengan cara lain. Daripada fakta yang tidak dipertikaikan, perayu-perayu adalah satu-satunya penyumbang kepada Hong Meng Sdn Bhd. Oleh itu, tidak ada sebab untuk PK membuat perintah untuk membahagikan Hong Meng Sdn Bhd dalam lima bahagian yang sama rata di kalangan adik-beradik tersebut. Berhubung dengan pemulangan wang Skudai Land oleh D1 dan pembayaran balik dua pendahuluan yang diperintahkan oleh PK, PK telah melakukan kesalahan asas apabila dia mengabaikan peruntukan dalam Akta Syarikat 2016 dan prinsip undang-undang syarikat yang mantap iaitu jika terdapat apa-apa kesalahan yang dilakukan terhadap syarikat, hanya syarikat yang boleh memulakan tindakan untuk membetulkan kesalahan tersebut. Oleh itu, responden-responden yang tidak ada kaitan dengan Hong Meng Sdn Bhd tidak mempunyai locus standi untuk membawa apa-apa tindakan bagi pihak syarikat (lihat perenggan 86–88).

(9) Berdasarkan fakta yang diplidkan dan keterangan yang dikemukakan oleh responden-responden, responden-responden telah gagal untuk melepaskan beban undang-undang untuk membuktikan kewujudan mana-mana fakta yang berkaitan untuk menunjukkan bahawa harta yang dipertikaikan adalah harta amanah dan perayu-perayu adalah pemegang amanah mereka. Oleh itu, beban keterangan masih belum beralih kepada perayu-perayu untuk mengemukakan keterangan menyangkal. Berdasarkan dapatan ini, mahkamah menjawab isu pertama dan isu kedua dengan memihak kepada perayu-perayu. Berhubung dengan isu ketiga, berdasarkan dapatan di atas, mahkamah memutuskan bahawa PK adalah jelas salah dalam pendekatannya untuk membuat inferens bertentangan terhadap perayu-perayu kerana tidak memanggil D2 dan peguam tersebut sebagai saksi. Pesuruhjaya kehakiman telah mengabaikan prinsip-prinsip penting undang-undang

keterangan, iaitu undang-undang mengenai beban pembuktian terutamanya dalam kes-kes apabila amanah ingin dibuktikan. Inferens bertentangan hanya boleh dibuat jika responden-responden (sebagai plaintif-plaintif di Mahkamah Tinggi) telah berjaya membuktikan kes mereka dan jika perayu-perayu (sebagai defendan-defendan di Mahkamah Tinggi) gagal memanggil saksi atau saksi-saksi yang berkaitan untuk menyangkal kes responden-responden yang telah dibuktikan (lihat perenggan 89–91).

(10) Berdasarkan fakta-fakta yang diplidkan, responden-responden mengetahui tentang kewujudan amanah yang didakwa tersebut ke atas harta yang dipertikaikan sejak harta tersebut dipindahkan sama ada kepada CMS atau perayu-perayu sekitar tahun 1970. Responden-responden dalam keterangan mereka juga mengakui hakikat bahawa mereka telah lama tahu berkenaan amanah tersebut sebelum mereka memfailkan tindakan terhadap perayu-perayu. Bagaimanapun, responden-responden tidak mengambil apa-apa tindakan sama ada memfailkan tindakan atau memasukkan kaveat bagi memastikan tuntutan mereka ke atas harta yang dipertikaikan tersebut. Responden-responden telah berdiam diri ke atas hak mereka dan akur untuk suatu tempoh yang lama. Adalah tidak adil untuk mempertimbangkan tuntutan responden-responden untuk remedi apabila mereka melalui tingkah laku mereka sendiri boleh dianggap telah membuat penepian atau estoppel. Ketidakadilan yang berlaku kepada perayu-perayu tidak dapat dipertikaikan. Oleh itu, dapatan PK mengenai pembelaan laches adalah salah. Jika pun responden-responden berjaya membuktikan dakwaan mereka, responden-responden masih gagal mengatasi halangan doktrin laches (lihat perenggan 92, 94 & 97–99).]

Cases referred to

Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd [1995] 3 MLJ 417, CA (refd)

Anjalai Ammal & Anor v Abdul Kareem [1969] 1 MLJ 22, FC (refd)

Datuk M Kayveas v See Hong Chen & Sons Sdn Bhd & Ors [2014] 4 MLJ 64, FC (refd)

Iftikar Ahmed Khan (as the executor of the estate for Sardar Mohd Roshan Khan, deceased) v Perwira Affin Bank Bhd (previously known as Perwira Habib Bank Malaysia Bhd) [2018] 2 MLJ 292, FC (refd)

Instantcolor System Sdn Bhd v Inkmaker Asia Pacific Sdn Bhd [2017] 2 MLJ 697, FC (refd)

Johnson v Gore Wood & Co (a firm) [2002] 2 AC 1, HL (refd)

Keruntum Sdn Bhd v The Director of Forests & Ors [2017] 3 MLJ 281, FC (refd)

Lee Phek Choo v Ang Guan Yau & Anor [1975] 2 MLJ 146, FC (refd)

Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo

Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd [2017] 4 MLJ 697, FC (refd)
Lewski v Australian Securities & Investments Commission Vid 752 of 2014 (2016) 337 ALR 1, FC (refd)
Loo Hon Kong v Loo Kim Lim [2004] 4 CLJ 1, CA (refd)
Ng Hoo Kui & Anor v Wendy Tan Lee Peng, Administrator of the Estates of Tan Ewe Kwang, Deceaseds Ors [2020] 12 MLJ 67; [2020] 10 CLJ 1, FC (refd)
Pecore v Pecans (2007) 1 SCR 795, SC (refd)
Pembenaan SPK Sdn Bhd v Jalinan Waja Sdn Bhd [2014] 2 MLJ 322, CA (refd)
Perbadanan Kemajuan Pertanian Selangor v JW Properties Sdn Bhd [2017] MLJU 1107; [2017] 8 CLJ 392, FC (refd)
Pioneer Haven Sdn Bhd v Ho Hup Construction Co Bhd & Anor and other appeals [2012] 3 MLJ 616, CA (refd)
Quah Ooi Keat & Anor v Yew Phaik Hoon [1966] 2 MLJ 208, FC (refd)
SK M&E Bersekutu Sdn Bhd v Pembinaan Legenda Unggul Sdn Bhd (in creditors' voluntary liquidation) and another appeal [2019] 3 MLJ 281, FC (refd)
Takako Sakao v Ng Pek Yuen & Anor [2009] 6 MLJ 751, FC (refd)
Tung Kean Hin & Anor (as executor for the estate of Tung Leong Geok, deceased) v Yuen Heng Phong (as administrator for the estate of See Ngan Sang @ Lee Ngan Sang) [2019] 2 MLJ 334, CA (refd)
Westdeutsche Landesbank Girocentrale v Islington LBC [1996] 2 WLR 802, HL (refd)

Legislation referred to

Companies Act 2016
Limitation Act 1953 s 22(1)(b), (2)
National Land Code
Trustee Act 1949 s 3

Appeal from: Suit No JA-22NCvC-211–10 of 2018 (High Court, Johor Bahru)

Gurdial Singh Nijar (Abraham Au Tian Hui, Simon Tan Hong Jin and Alvina Mun with him) (Aswar, Simon & Azhar) for the appellant.
Yeo Chun Ming (Leslie Looi Meng with him) (CM Yeo & Assoc) for the respondent.

Che Mohd Ruzima JCA:

INTRODUCTION

[1] At the High Court in Johore Bahru, upon conclusion of a full trial, the learned judicial commissioner (the learned JC) adjudged and declared that Tan Keng Yong @ Tan Keng Hong (first appellant/first defendant) and Tan Keng Meng (second appellant/second defendant), the older brothers, held the portion of the assets derived from their father on resulting trust and/or

constructive trust for Tan Hwa Ling @ Tan Siew Leng (first respondent/first plaintiff), Tan Siew Hoon (second respondent/second plaintiff) and Tan Siew Ching (third respondent/third plaintiff), the younger sisters and proceeded to grant the necessary reliefs for the recovery of the trust assets. Dissatisfied with the whole decision, the appellants filed this appeal.

[2] For ease of reference, parties in this appeal will be referred to as in the trial court, the plaintiffs and the defendants. Individually the plaintiffs will be referred to as P1, P2, P3 and the defendants will be referred to as D1 and D2.

BRIEF BACKGROUND FACTS

[3] The plaintiffs and the defendants are siblings. They are the children of one Tan Peng Khai (TPK), the deceased father and Chee Mee Sin (CMS), the deceased mother. In the order of age, D1 is the eldest son, P1 is the eldest daughter and second child, D2 is the second son and third child, P2 is the fourth child and P3 is the youngest child.

[4] TPK was diagnosed with cancer in 1963 and passed away on 18 October 1970. Before his death, all his immovable properties had been transferred either to his wife or to D1. Approximately two and a half years later on 21 April 1973, CMS passed away as well. Before that, she did transfer all immovable properties registered under her name either to D1 or D2. These immovable properties are now the subject of the dispute between the plaintiffs and the defendants in the plaintiffs' claim.

[5] For better understanding, we find that it is benefitable to reproduce the details of the properties involve as set out in the Appendix A of the counsel for defendants' written submission in encl 36. The details of the properties involve have been comprehensively set out and the learned counsel for the defendants also indicated the chronology of events and the related transactions done with reference to the relevant appeal record. So, we reproduced the said Appendix A with some modification as follows:

No	Date	Event	Reference
1	23.9.1970	A bungalow house at No. 4, Jalan Wisata, 80200 Johor Bahru (Bungalow) was transferred by TPK's brother, Tan Peng Song vide Form 14A to TPK's wife, CMS, for a consideration of RM29.000.00.	RR Bahagian C Jilid 2C/page 695–697
		A rubber plantation land held under title CT 8549 Lot 4653, in Saleng, Johor (Saleng Rubber Plantation Land) was transferred by TPK vide Form 14A to his wife, CMS for a consideration of RM12.000.00.	RR Bahagian C Jilid 2C/page 687–690
		A shophouse at No.96-96C, Jalan Wong Ah Fook, 80000 Johor Bahru (Shophouse 96), Johor was transferred by TPK to the D1 for a consideration sum of RM90,000.00. The said Form 14A stated that Shophouse 96 was to be held on trust for D2. A trust deed was also executed.	RR Bahagian C Jilid 2C/page 681–683
		A shophouse at No.100-100C, Jalan Wong Ah Fook, 80000 Johor Bahru (Shophouse 100), Johor was transferred by TPK to, D1, for a consideration sum of RM99,000.00.	RR Bahagian C Jilid 2C/page 684–686
2		The 1/5 share of a land at No.40, Jalan Skudai, 80200 Johor Bahru (Skudai Land), Johor was transferred to the D1.	RR Bahagian A Jilid 1/page 90–92/para 9(vii)
3		A shophouse at No.47, Jalanraya Skudai, 80000 Johor Bahru (Shophouse 47), Johor was transferred to the D1.	RR Bahagian A Jilid 1/page 90–92/para 9(vii)
4		TPK's public listed/traded shares were transferred to CMS and thereafter transferred to P2.	RR Bahagian A Jilid 1/page 90–93/para 9(x)

5	18.10.1970	TPK passed away.	RR Bahagian C Jilid 2C/page 574
6	14.11.1970	The Saleng Rubber Plantation Land was registered in the name of CMS.	RR Bahagian C Jilid 2C/page 641–641
7	1.6.1972	The Saleng Rubber Plantation Land and the Bungalow were transferred by CMS to D2, in consideration of love & affection.	RR. Bahagian C Jilid 2C/page 672-674
8	1.6.1972	The 1/5 share of a shophouse at No.37, Jalan Wong Ah Fook, 80000 Johor Bahru (Shophouse 37). Johor was transferred by CMS to the D2 in consideration of love & affection. The 1/5 share of a shophouse at No 39 Jalan Wong Ah Riok: 8000Q Johor Bahru. Johor (Shophouse J9) was transferred by CMS to D2 in consideration of love & affection.	RR Bahagian C Jilid 2C/page 675–676
9	28.6.1972	Shophouse 96 was transferred by D1 to D2 pursuant to the Deed of Trust.	RR Bahagian C Jilid 2C/page 678–579
10	21.4.1973	CMS passed away.	RR Bahagian C Jilid 2C/page 575
11	22.9.1978	Tan Hak Heng Sdn Bhd (THH Sdn Bhd) was mco-paraled.	RR Bahagian C Jilid SC/page 578
12	17.10.1978	M/S Tan Hak Heng (Holdings) Sdn Bhd (THH Holdings) was established.	RR Bahagian C Jilid 2C/page 585
13	27.12.1978	M/S Hong Meng Sdn Bhd (Hong Meng Sdn Bhd) was incorporated.	RR Bahagian A Jilid 1 ‘page 94/para 13
14	22.2.1983	Shophouse 100 transpired by D’ to THH Holdings.	RR Bahagiar C Jilid 2C/page 659
15	26.2.1983	Shophouse 96 was transferred by D2 to Hong Meng Sdn Bhd	RR Bahagian C Jilid 2C/page 691

16	15.2.1986	D2 and D1 were allotted 1 99:998 shares in Hong Meng Sdn Bhd after Shophouse 96 was sold to Hong Meng Sdn Bhd for a consideration price of RM450,000.00.	RR Bahagian C Jilic 2C'page 698
17	4.5.2016	P3, was appointed a director of Hong Meng Sdn Bhd.	RR Bahagian C Jilid 2C/page 598
18	20.10.2016	A Director's Circular Resolution (DCR) was executed by the directors of Hong Meng Sdn Bhd to advance a sum of RM300.000.00 each to D1 and D2. The DCR was signed by all 3 Directors, including the P3.	RR Bahagian C Jilid 2C/page 665–666
19	2016	The Skudai Land was sold for a consideration of RM1,482,000.00 to several subsequent purchasers.	RR Bahagian B Jilid 2B/page 459-460RR Bahagian C Jilid 2C/page 616–617
20	3.3.2017	D1 wrote an email to P1, copying Tan Siew Ching, P3.	
21	20.7.2018	A DCR was executed by the directors of Hong Meng Sdn Bhd to advance a sum of RM350,000.00 each to D1 and D2. The DCR was signed by D1 and D2.	RR Bahagian C Jilid 2C/page 667–668
22	22.10.2018	P1, P2, and P3 filed the present action against D1 and D2 for the above properties and shares.	RR Bahagian A Jilid 1/page 14–22
23	14.1.2020	High Court allowed Plaintiffs' claim as pleaded in paragraph 29 (aa), (aaa), (bb), (bbb), (cc), (ccc), (d), (e), and (f) with cost of RM25,000.00.	

All properties involve will be referred to as 'the disputed properties' and we will use the same abbreviation or short-form used by the defendant's counsel when we refer to the disputed properties individually.

THE PLAINTIFFS' CLAIM

[6] The crux of the plaintiffs' claim is that a trust was established in their favour with regard to the disputed properties previously belong to TPK. The plaintiffs' claimed is for the recovery of the disputed properties which were held on trust by the defendants, on their behalf. They claimed that the disputed properties to be distributed equally among the five siblings.

[7] The plaintiffs claimed that during the earlier years, as they were still young at that time, they had no complaints with the arrangement, since the understanding was that the returns of investment from the disputed properties in the form of rentals and dividends would be utilised to contribute to the plaintiffs' needs, including their education and other needs.

[8] The plaintiffs claim that a trust was created in their favour based on the oral assurance by TPK that 'they would be provided for after his passing from the cash, dividends from the shares and returns from the assets' that TPK had inherited and accumulated in his lifetime. The plaintiffs further pleaded that the purpose of establishing the trust, instead of allowing these assets to be bequeathed vide a will was to 'avoid substantial estate duty'.

[9] Furthermore, after the demise of their parents, numerous family meetings were held and during the meeting in February 2017, the plaintiffs were updated on the status of the disputed properties. However, in the last two years before instituting this action, when the plaintiffs demanded for the defendants to carry out the transfer of the disputed properties and allotment of the relevant shares in Hong Meng Sdn Bhd, the alleged family's company, to the plaintiffs and the defendants refused. The plaintiffs have no choice but to institute an action to enforce their right. There is a resulting trust in their favour in respect of the disputed properties. Alternatively, the plaintiffs' claim is for a constructive trust to be declared by the court, in light of the unconscionable conduct of the defendants handling the trust properties.

THE DEFENDANTS' DEFENCE

[10] On the other hand, the defendants claimed that the disputed properties were not held in trust for their siblings, but were inter vivos gifts from their parents in accordance with the tradition or custom of the Chinese community. Based on the documentary evidence, the transfer of the assets was meant to render that the defendants were the legal owners of the disputed properties.

[11] They further submitted that the plaintiffs had failed to prove the necessary conditions to establish a trust, and that even if the plaintiffs had proved the existence of such, the defendants averred that the plaintiffs' claim

was statute-barred by virtue of s 22(2) of the Limitation Act 1953 ('the LA 1953') and by the doctrine of laches.

[12] The defendants further contended that the plaintiffs' claim was based on the doctrine of illegality since it was the plaintiffs' case that the purpose of the transfer of the disputed properties was to avoid the imposition of estate duty upon TPK's death.

DECISION OF THE HIGH COURT

[13] The learned JC basically allowed the plaintiffs' claim in full. In summary, the said court's order is as follows:

(a) to order that the shares of Hong Meng Sdn Bhd to be equally apportioned and transferred in equal shares of 20% per sibling;

(b) to declare that the defendants hold the disputed properties on trust on behalf of the plaintiffs;

(c) to granted mandatory injunction to order the defendants to transfer the disputed properties in equal shares of 20% per sibling;

(d) to order D1 to give account and to returned the proceed of the 1/5 of the Skudai Land amounting to RM1,482,000 to Hong Meng Sdn Bhd;

(e) to order the defendants to pay back the advances of RM300,000 and RM350,000 taken from Hong Meng Sdn Bhd; and

(f) to order the defendants to pay cost of RM25,000 to the plaintiff together with the allocator fee of RM 1,000.

[14] The learned JC allowed the plaintiffs' claim on the basis that there was a resulting trust held by the defendants in favour of their siblings, based on the presumed intention of TPK in relation to the distribution of the disputed properties. The learned JC's reasoning in finding that there is a resulting trust in her grounds of decision are as follows:

(a) there is no reason to disbelieve the plaintiffs' version that TPK from 1963 until about three weeks before his death, had continually assured his school and university going children at that time that all his assets would be sufficient to provide for them, after his demise as the evidence adduced by them were convincing in their narrative;

(b) that there was no evidence of any payment although the transfer of some of the disputed properties to the D1 was for a consideration sum payable by D1 to TPK;

(c) it would be uncharacteristic of TPK to have transferred all the disputed properties to his sons and his wife, and to leave the plaintiffs who were at

that time still studying, with nothing whatsoever. On this basis the court can intervene by equity to give rise to a resulting trust or alternatively declare a constructive trust in favour of the plaintiffs who were left out;

(d) the absence of a will substantiated the plaintiffs' contention that the intention of TPK was for all his assets to be distributed equally amongst his children; and

(e) D2's failure to appear as a witness and the defendants' failure to call Mr P Kamalanathan, the lawyer engaged to handle the transfer of the disputed properties as a witness, resulted in an adverse inference drawn against the defendant.

[15] Further, the learned JC held that even if the intention of TPK for resulting trust cannot be verified, a constructive trust may be imposed on the defendants in favour of the plaintiffs on the following reasons:

(a) there was no doubt that the relationship between the siblings is one of trust and confidence and that D1 being the eldest brother commanded a certain level of respect and control over his younger sisters;

(b) D1 stood in a fiduciary position on the demised of TPK and CMS and they had left it to D1 as the oldest child to address family issues, including dealing with the TPKs disputed properties and providing for the siblings;

(c) in light of the nature of the relationship of trust and confidence between the parties as siblings, the defendants' conduct in withdrawing substantial sums of monies from Hong Meng Sdn Bhd in October 2016 and July 2018, the sale of the Skudai Land in 2016 by D1 and the transfer of 4/9 of the Saleng Plantation Land to the D2's children was sufficiently unconscionable; and

(d) an email dated 3 March 2017 from D1 to P1 which contains the word 'trust' is amount to an admission by D1 that the disputed properties of TPK were in actual fact held in trust as claimed by the plaintiff, and this corroborates the Respondents' claim.

[16] As to the defendants' contention that the plaintiffs' claim was barred by the limitation and/or doctrine of laches, the learned JC held that the defence of limitation does not apply to the recovery of trust property from the trustees under s 22(1)(b) of the LA 1953 and the doctrine of laches would not apply as the plaintiffs had truly believed that the defendants being their brothers, were holding TPK's disputed properties on all their behalf, and had no issue with the defendants to continue holding the same on trust on their behalf until they discovered the act of breach of trust by the defendants.

[17] Finally, the learned JC held that the plaintiffs' averment in relation to

estate duty are not barred by illegality as what transpired was not a case of evasion of estate duty but one of avoidance, which is not illegal.

THE APPEAL

[18] The defendants had listed all together 16 grounds in their memorandums of appeal. Before us, the learned counsel for the defendants had focused his submissions on four main issues that are, the issue on the plaintiffs' pleadings, the issue of the plaintiff's burden of prove and the evidence adduced, the issue of the adverse inference drawn by the learned JC against the defendants for failing to call D2 and the lawyer who did the transfer of the disputed properties to give evidence and finally, the issue on defendants' defence on time limit and/or on laches.

[19] As to the issues on the pleadings, the learned counsel for the defendants' argued that the learned JC's decision is not in accordance with the pleadings. Despite that the plaintiffs' pleadings are based on an express or an implied trust, the learned JC allowed the plaintiffs' claim on the basis that there was a resulting trust or alternatively, a constructive trust, The learned JC relied on a relationship and confidence' between the plaintiffs and the defendants, as they are siblings. In any event, there is no clear and unequivocal evidence to support the establishment of a resulting or constructive trust, especially there were evidence of an outright transfer of the disputed properties, The said departure from the pleadings is a material error of law.

[20] Related to the same issue, it was argued that the learned JC failed to evaluate the contradictions in the pleadings and the evidence as to intention to create a trust. In their further and better particulars, the plaintiffs contended that TPK made a will to bequeath the property to them, but, in their evidence the plaintiffs contended that TPK created a trust to avoid estate duty. Then, the plaintiff alleged that TPK could not understand the contents of the transfer documents, that he did not sign those documents voluntarily, that that the attesting solicitor lied, the transfer was a fraud and finally, that the transfers were forged even though those allegations were not pleaded by the plaintiff in their pleadings.

[21] On the issues of the burden of prove and evidence, the learned counsel for the defendants submitted that the plaintiffs failed to provide direct or indirect evidence of a clear and unequivocal intention to create the trust. The plaintiffs' evidence is that they did not hear from TPK about the creation of the trust nor did they know about the terms of the trust. The plaintiffs' case was based on belief and on PTK's words that 'all of you will be taken care of. The plaintiffs' knowledge of how they knew of TPK's intention to create a trust is based completely on hearsay evidence. Besides that, there is not a single

contemporaneous document evidencing the creation of the trust. Therefore, the learned JC erred in law for shifting the evidential burden on the defendants even though the plaintiffs failed to discharge their primary initial burden of proving their case.

[22] Then, the learned JC erred in law in drawing an adverse inference against the defendants for failing to call D2 and the lawyer who did the transfers to testify. Plaintiffs had to prove their case and nothing to stop the plaintiffs from calling any witnesses including the opposing party. As to the lawyer, no adverse inference can be. The plaintiffs had abandoned their ground on fraud and the transfers of the disputed properties were properly executed and subsequently registered in the related transferees' names, Since the plaintiffs were impugning the transfers it was for them to call a lawyer.

[23] Finally, on the issue of limitation and laches, the plaintiffs admitted that they discovered the alleged breaches since 1970, and particularly in 2005 when P2 had asked D1 for financial help. Yet the learned JC's dismissed the laches defence on the basis of incidents occurred in 2016 to 2018.

[24] In contrast, the learned counsel for the plaintiffs submitted that there is no error in the decision of the learned JC which warrant appellate intervention, The learned JC, armed with the audio and visual advantage of assessing the testimony and demeanour of all the witnesses, correctly establish a resulting trust in favour of the plaintiffs.

[25] Based on the finding of facts as reflected in the grounds of decision, it showed that the plaintiffs were convincing in their narrative and had proved their narrative on a balance of probabilities, that TPK's intention was for all the disputed properties to be held in trust by the D1 and CMS who later transferred the trust properties under her name to D1. The JC's findings, inter alia, on the following grounds:

(a) that there was 'no reason to disbelieve the plaintiffs' evidence that TPK from 1963 until about three weeks before his death, had continually assured his school and university going children at that time that all his assets would be sufficient to provide for them, after his demise';

(b) that the absence of a will issued by TPK substantiated the plaintiffs' contention that the intention of the deceased was for all his assets to be distributed equally amongst all his children; and

(c) that it would be uncharacteristic of the deceased, particularly on his death-bed, to have transferred and/or sold all his assets to his sons, the defendants, and his wife, CMS and to leave his three daughters, the plaintiffs, who were at that time still studying, with nothing whatsoever.

[26] Therefore, the learned JC correctly imposed a constructive trust as an alternative on the appellants in her finding based on the facts that:

(a) the relationship between the plaintiffs and the defendants as siblings was one of trust and confidence whereby the plaintiffs were young and vulnerable as they were still studying and had just lost their father and, therefore had required the support of D1;

(b) the conduct of the defendants in subsequently withdrawing substantial sums of monies for themselves, selling the trust asset while keeping the proceeds and transferring parts of the trust assets to his children to unjustly enriched themselves was sufficiently unconscionable for a constructive trust to be imposed; and

(c) that there was an unequivocal admission of the trust arrangements by D1 in his email to the P1 dated 3 March 2017 and that P3 was also appointed as a director and made the bank account signatory of Hong Meng Sdn Bhd, the family company managing some of the assets inherited from TPK.

[27] On the issue of an adverse inference, the counsel for the plaintiffs submitted that the learned JC rightfully held that there was lack of probity on the part of the defendants when D2 and the lawyer who did the transfers consciously choosing not to take the stand as a witness, and inevitably not to be subjected to cross-examination, although listed as witnesses in the defendants' list of witnesses.

[28] Lastly, on the issues of limitation to act and laches, the counsel for plaintiffs argued that the plaintiffs claim was not barred under s 22(1)(b) of the Limitation Act 1953, which provides that no period of limitation applies to an action by a beneficiary under a trust being an action to recover from the trustee trust property. As to laches, the defendants' conduct of withdrawing substantial sums of monies for themselves from the family company, selling the trust asset while keeping the proceeds, transferring parts of the trust assets to his children and the sudden refusal to acknowledge the trust arrangements, are events that only occurred in the last two years before the suit was filed. Therefore, the principle of laches cannot apply.

FINDING OF THIS COURT

[29] The crux of defendants' appeal is based on four broad issues. Their main attack is on the plaintiffs' pleadings, then the plaintiffs' burden of prove. Next, on the adverse inference drawn against them and finally, on the issue of limitation or laches. It was argued that the learned JC's decision is plainly wrong when footed on unpleaded facts, expanding the plaintiffs' case beyond their pleadings, failed to apply the correct standard of proof, failed to judicially

and properly appreciate the evidence and misconstrued the law of trust. Based on the said argument, we will look at the first and the second issue together.

[30] First and foremost, we have to examine the plaintiffs' pleading. The main contention pleaded by the plaintiffs as to the basis for the creation of trust in their favour in regard to the disputed properties can be found in paras 8–9 of their statement of claim. Those two paragraphs are as follows:

> 8. During the preceding years prior to their Father's passing on the 13/10/1970. their Father had always assured their Mother that she and all Siblings that they would be provided for after his passing [and their Mothers passing] from cash, dividends from the shares and from the returns from the assets that their Father had inherited and accumulated in their Father s lifetime.
>
> 9. Just before their Father passed away on 18/10/1970 due to a sudden drastic deterioration of his condition, in order to avoid the substantial estate duty which would have been imposed on their Fathers cash, shares and assets upon his passing, their Father instructed that all his following assets be swiftly transferred to their Mother the 2nd Plaintiff, the 1st Defendant and/or the 2nd Defendant, to be held on trust for all the Siblings equally with the returns from the following assets to be utilised to take care of their Mother and all the Siblings ...

Then, the plaintiffs listed all the ten disputed properties which they claim to be held on trust for the whole family either by D1, CMS or P2 in the following subparagraphs of para 9 of the statement of claim.

[31] In the following para 10, the plaintiffs pleaded that the returns from the disputed properties, mostly from rentals and some from dividends, were utilised to take care of CMS and to support all the siblings after TPK pass away.

[32] In para 11, it was pleaded that CMS, their mother, transferred the disputed property under her name to the defendants to be held in trust for all the siblings, prior to her death.

[33] Next, the plaintiffs focused their pleaded facts on the management of the disputed properties as trust properties by the defendants and P2 in para 12 the statement of claim, including the incorporation of Hong Meng Sdn Bhd as a family company in paras 13–14, the transfer all public shares held by P2 to Hong Meng Sdn Bhd in para 15, D1 transferred Shophouse 100 to THH Holdings, the extended family company in para 17, D2 transferred Shophouse 96 to Hong Meng Sdn Bhd in para 18.

[34] Then, the plaintiffs pleaded that the defendants failed, refuse and/or neglect to transfer the remaining disputed properties to Hong Meng Sdn Bhd from paras 19–21 and the defendants continue to withdrew large sums of

advances from the purported family company in para 25. Finally, the defendants denied the existence of any trust as pleaded in para 26 of the statement of claim.

[35] In summary, the plaintiffs' claim is based on PTK's assurance that CMS and all the siblings would be provided for after his death from the dividends of the shares and from the returns of the assets that PTK had inherited and accumulated during his lifetime. Before he died and to avoid estate duty, PTK had transferred the disputed properties to CMS, P2 and D1 or later D2, to be held on trust for all the siblings equally.

[36] Finally, in para 29 of the statement of claim, the plaintiffs claimed against the defendants for a mandatory injunction to compel the defendants to transfer equally the shares of the Hong Meng Sdn Bhd and disputed properties among the siblings or for a declaration that the defendants hold all the disputed properties on trust on behalf of the plaintiffs.

[37] From the pleadings, it seems that the plaintiffs had framed their claim against the defendants in alternative, Initially, the plaintiffs' claimed that the existence of the trust is premised on a purported oral assurance by PTK that they would be provided for after PTK's passing from the cash, dividends from the shares and returns from the assets that PTK had inherited and accumulated in his lifetime. In order to avoid substantial estate duty which would be imposed on PTK's cash, shares and assets upon his passing, PTK transferred the disputed properties to CMS, P2: D1 and D2 to be held on trust for all the siblings equally. Then, prior to the passing of CMS on 21 April 1973, in order to avoid the substantial estate duty which would have been imposed on GMS's holding upon her passing, CMS transferred the disputed properties held by her to D2 to continue to hold them on trust for the siblings.

[38] In other words, the plaintiffs' initial pleaded case is founded on an express trust, direct or implied. Based on their claim, the plaintiffs claim for a mandatory injunction as a remedy to compel the defendants to transfer the shares of Hong Meng Sdn Bhd and the disputed properties to them.

[39] However, in para 28 of the statement of clairn the plaintiffs pleaded as follows:

> The *particulars of fraud and/or breaches* relates to the 1st Defendants and 2nd Defendant's recent sudden refusal to recognize the trust involving rhe asset of their Father and therefrom and their positions as trustees for themselves and 1st Plaintiff, 2nd Plaintiff and 3rd Plaintiff while continuing to fail, refuse and/or neglect In carrying out the trust positions and/or obligations agreed upon between all the parties earlier.

Based on the said paragraph, the plaintiffs claimed their remedy in alternative that is for a declaration that the defendants are holding the shares of Hong Meng Sdn Bhd and the disputed properties on trust for and on behalf of them.

[40] From the alternative prayer as pleaded in the plaintiffs' statement of claim, it was argued that the plaintiffs are alternatively harping their claim on a trust arising by operation of law, could be a resulting trust or a constructive trust and the learned JC had accepted the plaintiffs' argument and then allowed the plaintiffs claim in alternative, that is under the resulting trust or the constructive trust.

[41] Regardless of the nature of the claim, either for the main claim or the claim in alternative, it is trite law that the plaintiffs bear the initial burden to prove their claim. The burden of prove rests on the plaintiffs throughout the case. It is only after the plaintiffs had discharged their burden then the evidential burden shifts to the defendants to disprove the plaintiffs claim. The Federal Court in *Letchumanan Chettiar Alagappan @ L Allagappan (as executor to SL Alameloo Achi alias Sona Lena Alamelo Acho, deceased) & Anor v Secure Plantation Sdn Bhd* [2017] 4 MLJ at pp 739–740 held that:

> [54] Section 101(1) provides that 'Whoever desires any court to give judgment as to any legal right Dr liability, dependent on the existence of facts which he asserts, must prove that those facts exist'. 'Section 101 slates that the initial burden of proving a prima facie case in his favour is cast on the plaintiff ... (Woodroffe and Amir Ali *Law of Evidence* (19th Ed Vol 3) at p 3194). Illustration (b) to s 101 puts it beyond doubt that the 'burden of proof rests throughout on the plaintiff. Section 102 provides that 'the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side'. The initial onus of proving the case is always on the plaintiff (*Sarkar Law of Evidence* & 16th Ed at p 1593). Illustration (a) to s 102 puts it beyond doubt that a plaintiff has the initial onus of proof.
>
> [55] But 'when (the plaintiff) gives such evidence as will support a prima facie case, the onus shifts on to the defendant to adduce rebutting evidence to meet the case made out by the plaintiff As tha case continues to develop, the onus may shift back again to the plaintiff. It is not easy to decide at what particular stage in the course of the evidence, the onus shifts from one side to the other. When after the entire evidence has been adduced, the tribunal feels it cannot make up its mind as to which of the versions is true, it will hold that the party on whom :he burden hes has not discharged the burden, but if it has, on the evidence, no arfficulty arriving at a definite conclusion, then the burden of proof on the pleading recedes nto the background' (Woodroffe and Amir Afi, at p 3194: see also *Abraln v The North Eastern Railway Company* at p 452). '... the onus of proof may shift ... but the question must ultimately arise whether the poison who is bound to prove the affirmative of the issue ,.. has discharged ... thai burden' (*Jane Wakelin v The London and South Western Railway Company* (1886) 12 App Gas 41 per Lord Halsbury LC)

A or proved his case sufficiently to justify a judgment in his favour' (*Stoney v Eastbourne Rurst District Council* [1927] 1 Ch 367 at p 397 per Lord Hanworth MR).

...

B [56] Thus, a plaintiff has both the burden of proof as well as the initial onus of proof. In *Britestone Pte Ltd v Smith & Assooiales Far East, Ltd* [2007] 4 SLR 855, the Singapore Court of Appeal per VK Rajah JCA delivering the judgment of the court, explained that at the start of the plaintiffs case the burden of proof and the onus of proof coincide:

C > ... at the start of the plaintiffs case, the legal butlen of proving the existence of any relevant feet that the plaintiff must prove and the evidential burden of seme (not irnerently incredible) evidence of the existence of such fact coincide. Upon adduction of that evidence, the evidential burden shifts to the defendant, as the case may be, to adduce some evidence in reauttai. If no evidence in rebuttal is
D > adduced, the court may conduce 'on the evidence ot defendant If, on ihe other hand, evidence in rebuttal is adduced, the evidential burden shifts back to the plaintiff. If ultimately, the evidential burden comes to rest on the defendant, the legal burden of proof of the relevant fact would have been discharged by the plaimiff. The legal burden of proof — a permanent and enduring burden — does not shift. A party who has the legal burden of proof on any issue must
E > discierge It throughout. Sometimes, the legal burden is spoken of, inaccurately, as 'shifting'; but what is truly meant is that another issue has been engaged, on which the opposite party hears the legal burden of proof.

F [57] The rule is that 'the onus of proof of any particular fact lies on the party who alleges it, not on him who denies it; *et incumbit probation quidecit, non qui negat, Actori incibit probation* ... The plaintiff is bound in the first instance, to show a prima facie case, and if he leaves it imperfect, the court will not assist him. Hence the maxim *Potior est condition defendantis.* A plaintiff cannot obviously advantage himself by the weakness of the defence. A plaintiff's case must stand or fall upon the evidence adduced by him. When, however, the defendant, or either litigant party,
G instead of denying what is alleged against him, relies on some new matter which, if true, is an answer to it, the burden of proof changes sides; and he, in his turn, is bound to show a prima facie case at least and, if he leaves it imperfect, the court will not assist him. *Reus excipendo fit actor'* (Woodroffe and Amir Ali, Vol 3 at pp 3190–3191).

H [58] 'The party on whom the *onus probandi lies* ... must begin' (Woodroffe and Amir Ali, Vol 3 at p 3192). 'The strict meaning of the term *onus probandi* is this: that if no evidence is given by the party on whom the burden is cast, the issue must be found against him' (Woodroffe and Amir Ali, Vol 3 at p 3189). 'The principle that the party who asserts the affirmative in any controversy ought to prove his assertion,
I and that he who only denies an allegation may rest on his denial, until, at least, the probable truth of the matter asserted has been established, is one which has received the widest recognition. The reason is obvious: to all propositions, which are neither the subject of intuitive or sensitive knowledge or probabilised by experience, the mind suspends its assent until proof of them is adduced or as it has been said: 'Words are but the expression of fact; and therefore, when nothing can be said to be

proved'; which is found is probably what is meant by the maxim *per rerum naturam, factum negantis probatio nulla est* (Woodroffe and Amir Ali, Vol 3 at pp 3190-3191).

[59] 'The test for determining which party has the affirmative, and therefore the burden of establishing a case, is found in the result of an inquiry as to which party if no evidence at all being given, the burden being, of course, on the adverse party' (Woodroffe and Amir Ali, Vol 3 at p 3203). That test is codified in s 102. 'The best tests for ascertaining on whom the burden of proof lies, are to ascertain first which party would succeed if no evidence were given on either side; and secondly, what would be the effect of striking out of the record the allegation to be proved. The onus lies on whichever party would fail, if either of these steps were pursued' (*Sarkar* at p 1590).

[42] Thus, the initial burden to prove that Hong Meng Sdn Bhd, the so-called family company and the disputed properties owned by the defendants are trust properties is on the plaintiffs. If they succeeded, then the burden shifted to the defendants to disprove it. In other words, it is not the duty of the defendants to first prove that the incorporation of Hong Meng Sdn Bhd is not a family business company or the transfers of the disputed properties were in fact intended as gifts from PTK or CMS.

[43] To prove their claim, P1, P2 and P3 were called as witnesses. The evidence adduced by them in their witness statement is almost similar. In answering the very same question, that is in question 8 that asked about PTK's action after knowing that he had a cancer in 1963, P1 gave the following answer (see *Rekod Rayuan Bahagian* B *Jld* 2B at p 502):

Our father's main priority then was always to ensure that all his young children would be provided for when he pass on. He got someone to prepare a Will for him sometimes thereafter which I saw him signed and explained it to uncle Che Pui Leong and uncle Ng Buck Heng, his good friends, who were the signatory witness to the will.

P2 gave the following answer (see *Rekod Rayuan Bahagian* B *Jld* 2B at p 524):

As explained by my sister earlier, our father's main priority then was always to ensure that all his young children would be provided for when he pass on. I believe he got someone to prepare a Will for him sometimes thereafter to provide for my mother to continue to manage all his assets after he passed on and for all his assets to be distributed among his children equally when we grew up.

Meanwhile, P3 had given slightly different answer as follows (see *Rekod Rayuan Bahagian* B *Jld* 2B at p 546):

As explained by my sisters, our father's main priority then was always to ensure that all his young children would be provided for when he pass on. I was very young at the time and spend the most time with my father. I knew he had a Will done up

because he got me to read it to him once in a while and he intended my mother to continue to manage all his assets after he passed away and for all his assets to be distributed among his children equally when we grew up.

[44] To answer another identical question asked, 'What happened while your father was having his follow up treatment?' as in question 12 for P1 and question 10 for P2 and P3, all of them had given almost the same answer. P1 had given the following answer (see *Rekod Rayuan Bahagian* B *Jld* 2B at p 530):

> Our mother would always voice her concern that the children were still young and that he needed to get well and our father would then continually assure my mother that all the siblings would be sufficiently provided for from all his accumulated assets, and those to be inherited by him or would be divested to him in due course, from his father's, my grandfather's estate.

P2's answer was as follows (see *Rekod Rayuan Bahagian* B *Jld* 2B at pp 524–525):

> Our mother would always remind him that the children were still young and that he needed to get well and our father would then continually assure my mother that all the siblings would be sufficiently provided for from all his accumulated assets, and those to be inherited by him or would be divested to him in due course, from his father's, my grandfather's estate.

Finally, P3 gave the following answer (see *Rekod Rayuan Bahagian* B *Jld* 2B at pp 546–547):

> Our mother would always voice her genuine concern that the children were still young and that he needed to fight the cancer and get well. Our father would always assure my mother and me that all the siblings would be sufficiently provided for from all his accumulated assets, and those to be inherited by him or would be divested to him in due course, from his fathers, my grandfather's estate.

[45] In cross-examination, P1 admitted that PTK did not mentioned anything about the trust. Her understanding of a trust was merely premised on the belief that PTK had represented to her that the children would be 'well looked after' when he passed on as he had enough properties to 'see them through' (see *Rekod Rayuan Bahagian* B *Jld* 2A, at p 198):

> GST: Hold on. You yourself did riot heat what your father had said about the alleged trust, correct? Yes or no? Yes or no? No?
>
> TAN: All the while my father had been telling us —
>
> GST: No, so you have heard it or not what your father told? Simple question. You heard what your father said about the trust, alleged trust?
>
> TAN: No.

GST: Good. So, you dfd not hear anythmg from your father about the alleged trust? Alleged trust, correct?

TAN: Can I rephrase?

GST: Please.

TAN: All the while, my father has beer tell us we dont have to worry because all of us will be well looked after and he has got enough properties to see us through.

GST: That is all your father said, isn't it?

TAN: Yes.

Besides that, P1 also admitted that she does not know the terms of the alleged trust created by PTK (see *Rekod Rayuan Bahagian* B *Jld* 2A, at p 256):

GST: Now Madam, question what were the terms of the trust?

TAN: I don't know,

[46] P2 took similar stand during cross-examination. She testified that her belief of such trust existed on PTK's representation that all the siblings would be 'taken care of' (see *Rekod Rayuan Bahagian* B *Jld* 2A, at p 269):

GST: No, your case is not based on that —

HOON: No because when my father was alive, he has always assured all of us that we will be equally taken care of.

GST: I see, so that is what your case is all about. Since your father said all of you will be taken care of using all his properties, therefore there is a trust.

HOON: Yes.

[47] P3, who hold Master Degree in law and a practising lawyer for three years in Johore Bahru gave uncertain answer when cross-examined on the existence of the so-called trust over PTK' assets (see *Rekod Rayuan Bahagian* B *Jld* 2A, at pp 349–352):

GST: He was right. Now you know this case is all about a claim by your self and your two sisters that the properties were held on trust, right. Do you also say that the properties were all held on trust?

CHING: Yes.

GST: Yes. Held by whom?

CHING: Held by my mother and later by my brothers.

GST: You see when your father passed away, some properties came to your mother, some to your brother, isn't it? And to you, your mother and brothers were holding it on trust, isn't it?

CHING: Yes.

GST: But your mother transferred the properties to the sons especially the Second Defendant?

CHING: No, transferred the trust to them, substituting the trustee.

GST: Substituting, do you have a document showing that the trust was substituted?

CHING: No. There was no express trust.

GST: So there was no express trust. There was only an implied trust. Is that what you are saying?

CHING: Yes.

GST: Based on what?

CHING: Based on what my mother and brothers told us —

GST: No, would you, alright. Is your case today or claim today based on an expressed trust?

CHING: No.

GST: It is not based on an expressed trust. Am 1 right?

CHING: No.

GST: So your father never stated that there should be a trust. Correct? Because there is no expressed trust.

CHING: I don't know.

GST: You don't know whether your father said anything?

CHING: Yes, I don't know.

GST: Fine, you don't know. Very well. And did your mother say 'I'm holding it on trust'?

CHING: I don't know.

GST: So you don't know even whether your mother said it should be held on trust, right?

CHING: Because she won't know the word 'trust'.

GST: Alright, did she use any other word?

CHING: Just she held it.

GST: Held it? Pardon?

CHING: Pass it to her for the family.

GST: Alright. In other words, your mother said your father passed it to her for the family.

CHING: Yes.

GST: I see. That's all she told? Is that correct? A

CHING: Yes.

[48] From the said relevant testimonies, we are of the opinion that the plaintiffs could not prove that there is either an express trust or implied trust created by PTK or subsequently by CMS. Federal Court in *SK M&E Bersekutu Sdn Bhd v Pembinaan Legenda Unggul Sdn Bhd (in creditors' voluntary liquidation) and another appeal* [2019] 3 MLJ 281 at p 295 made the following observation: B

C

> [33] Now, reverting to the basics, it is a settled principle of law that in order for the legal relationship of trustee and beneficiary to come into existence as regards express private trusts, three essential features must be present. They are (a) certainty of words; (b) certainty of subject; and (c) certainty of object (see: *Tucker, Lynton, et al, Lewin on Trusts* (19th Ed, London: Sweet & Maxwell, 2015) at p 102; *Haley, Michael and Lara McMurty,* 'The Three Certainties', Equity & Trusts (5th Ed, London: Sweet & Maxwell, 2017) at p 44); *Yeong Ah Chee v Lee Chong Hai & Anor and other appeals* [1994] 2 MLJ 614 at p 624). Under a trust, a party holding title to property is subject to an obligation to keep or use the property for the benefit of another party. The person holding the property for another's benefit is called a trustee, while the person benefiting from the trust is called the beneficiary. The property covered by the trust is the trust property. D E

[49] In another Federal Court decision in *Lee Phek Choo v Ang Guan Yau &Anor* [1975] 2 MLJ 146, where the plaintiffs in that case alleged that the deceased had intended that the properties were to be held on trust 'to be divided amongst her grandchildren after her death'. This was purportedly derived from a conversation in the hospital where she heard the deceased utter expressions that the properties must be divided after her death. Lee Hun Hoe CJ (Borneo) at p 147 had opined that: F

G

> In creating a trust, as laid down by Lord Langdale MR in *Knight v Knight* (1840) 3 Beav 148 at p 173 there must exist the three certainties, that is, certainty of words, certainty of subject-matter and certainty of objects. *Snell's Principles of Equity* (26th Ed), discusses about the effect of absence of any of the certainties at pp 126 to 127 as follows:
>
> H
>
> > The paramount certainly is that of subject-matter in the first sense; if there is no cerainty as to the property to be held upon trust, the ertire transaction is nugatery. Next, if that certainty is present but there is uncertainty of objects there is a resulting trust for the settlor for once establish that a trust (of definite property) was intended and the legatee cannot take beneficially' the same applies where there is uncertainty of the subject matter as regards the beneficial interest, unless one of the beneficiaries can establsh a claim to the whole. I

Halsbury's Laws of England (3rd Ed) Vol 38 at p B3D para 1388 states that:

> A declaration of trust respecting any land or any interest therein must oe

A manifested anc proved cy some writing signed by some person who is able to declare the trust or by his will.

[50] Besides that, in *Quah Ooi Keat & Anor v Yew Phaik Hoon* [1966] 2 MLJ 208 the Federal Court had cautioned that the creation of a trust must be clear and unequivocal, and mere words of exhortation by a purported settlor cannot constitute a trust. In *Lee Phek Choo v Any Guan Yau & Anor* at p 148 Federal Court through the decision of Ong Hock Sim FCJ held that mere expressions of intention are not enough and equity will not perfect an imperfect trust.

[51] Clearly, from the evidence adduced and guided by the establish principle decided on this matter, we found that the plaintiff failed to fulfil the first requirement, that is the certainty of the words used. None of the plaintiffs was able to testify the exact words uttered by PTK or CMS to create a trust. Thus, the fundamental requirement for the creation of a trust was therefore not satisfied.

[52] Besides that, it is pertinent to note that plaintiffs' pleaded case on the existence of a trust contradicts their action taken before the trial and also their testimonies given in court. First, in response to the defendants' request for further and better particulars, the plaintiffs took a position to suggest that there was actually a will made by PTK in favour of all the siblings and for the disputed assets to be directly bequeathed to them. Then, they testified in court to pursue their stand on the existence of the will. P1 testified that she saw and read the will. Her oral testimony with regard to the will suggested that PTK intended to affect an outright transfer in favour of CMS and later to the siblings, and not a trust. P2 also testified that PTK made a will before he died, but she did not see it and P3's stand was that there was a will, but the PTK could have revoked it.

[53] Second, the plaintiffs in their testimony also testified that the transfers could not have been possible since PTK was very ill when the disputed properties were transferred to CMS or D1. During cross-examination, P1 suggested that PTK could not have understood the content of the transfer documents. She even claimed that the transfer documents were false and the attesting solicitor had lied on the document that PTK had voluntarily signed the said documents. She even label that the transfer of the disputed properties was a product of fraud. P2 took the same stand as P1 and further averred that the transfers were executed by way of forgery. Ironically, P3 took a different stand. She took position that she abandoned the issue on fraud in her claim (see *Rekod Rayuan Bahagian* B *Jld* 2A, at pp 349–352):

> GST: No, hold on, is fraud included in your claim?
>
> CHING: We never specify.

GST: There look at it at paragraph 28.

CHING: This refer more to the breach.

GST: Read it carefully again. The particular of fraud/or breaches' it does not says more breach. Look at it because Madam you will know. In fact, one judge in Court of Appeal said this is referred to as 'bastard conjunction'. The greatest contribution of the legal profession to the English Language. There's a case on that. That is why I'm asking you today. You tell us. Is fraud included in your claim before this Court?

CHING: No,

GST: No. isn't it? Fraud is not part in your claim, am I right? Spoak up please-.

CHING: Yes.

GST: Yes, we must not have any doubts about it. So, you are now abandoning fraud. Would you agree? You are now. because you said there s fraud, so you how abandoning fraud as basis of your claim. Is that conect? You got lo speak up, Madam.

CHING: Yes.

[54] We find that those contradictions go to the root of the plaintiffs' claim. The plaintiffs cannot claim that the transfers of the disputed properties were subject a trust and at the same claiming that PTK had intention to bequeath the disputed properties through a will, On the same note, if the transfers of the disputed properties were tainted with fraud or forgery, it is illogical to suggest that PTK had at the same time intended to create a trust for the disputed properties. Therefore, we are of the considered view that the plaintiffs failed to prove their case based on express or implied trust,

[55] Next, we will consider the plaintiffs' alternative claim, that is a trust arising by operation of law. The learned JC referred to s 3 of the Trustee Act 1949 and noted that the definition of 'trust' is not only confine to an 'express' one in her grounds of judgment (GOJ) at para [21]. Then, at para [22] she made a following finding:

As such, whether the trust sought to be established by the Plaintiffs is an implied, resulting and/or constructive trust, the sub-classification is only a matter of words, as it still falls under broader term of 'trust'. Therefore, regardless of the insufficient evidence to create an express trust, this court is not precluded by equity from intervening to give rise to a constructive trust if there was unconscionable conduct by the defendants.

[56] The learned JC then focused her consideration on a resulting trust as can be seen in paras [23]–[48] GOJ. She cited the decision of Lord Brown Wilkinson in *Westdeutsche Landesbank Girocentrale v Islington LBC* [1996] 2 WLR 802 and also referred to the decision of the Federal Court in the case of *Takako Sakao v Ng Pek Yuen & Anor* [2009] 6 MLJ 751 to support her

reasoning. Upon perusing the relevant evidence before her she found out that the plaintiffs had proved their narrative that PTKs intention was for all his assets to be held in trust by D1 and CMS for the whole family. In short, the learned JC had considered that the plaintiffs had proven their claim based on resulting trust.

[57] In alternative, the learned JC had considered the plaintiffs submission that in the event that the true intention of PTK is unable to be ascertain to give rise to a resulting trust, a constructive trust should be imposed in view of the unconscionable conduct of the defendants. On the issue whether the defendants' conduct was sufficiently unconscionable for a constructive trust, the learned JC answered it in affirmative. Her finding is based on the relationship between the plaintiffs and the defendants, as sibling, was one of trust and confidence. The reason given is, D1, being the eldest brother commanded a certain level of respect and control over his younger sisters, especially when they were young and vulnerable as they were still studying, had required the support from D1, At that material time, D1 stood in a fiduciary position as eldest son to address family issues, including dealing with PTK's assets.

[58] According to the learned JC, a constructive trust can be imposed based on the defendants' unconscionable conduct that they had enriched themselves. She found that the defendants had;

(a) withdrawn the substantial sum of RM600,000 and RM700,000 in October 2016 and July 2018 respectively from the family company, for their own use;

(b) D1 had sold 1/5 share of Skudai Land sometime in 2016 for RM1,482,000 and kept the proceed to himself; and

(c) D2 also in June 2018 had transferred 4/9 of the Saleng Land to his children and had taken out a substantial loan using Saleng Land as collateral. Besides that, the learned JC considered the email dated 3 March 2017 sent from D1 to P1 which said to contains admissions and acknowledgement by D1 of the plaintiffs claim.

[59] On this issue, the counsel for the defendants submitted that the learned JC misapplied the law without having regard to the *raison d'etre* of a resulting trust. It was argued that a resulting trust, as the name suggests, carries with it the effect of reverting or resulting the beneficial interest not to another person but back to the settlor. It is a creature of trust where the beneficiaries are undetermined and as a result of it, a trust is imposed on the person holding the property, in favour of the settlor.

[60] It was further argued that the scope of a resulting trust is limited. For a

resulting trust to exist, the intention of the settlor must be clearly established. From facts established, it must clearly and unequivocally show the destination of beneficial interest, whether the beneficial interest ought to remain with the settlor or to be passed on to the intended beneficiary. The court cannot presume there is a resulting trust unless the intention of the parties is made clear by the evidence.

[61] On this issue, we find merit in the counsel for the defendants' argument. We refer to the definition of resulting trust as decided by the Supreme Court of Canada in the case of *Pecore v Pecans* (2007) 1 SCR 795. Rothstein JJ in his judgment at para 20, define a resulting trust as follows:

> A resulting trust arises when title to property is in one party's name, but that party, because he or she is a fiduciary or gave no value for the property, is under an obligation to return it to the original title owner: see DWM Waters, MLR Gillen and LD Smith, eds, *Waters Law of Trusts in Canada* (3rd ed 2005) at p 362. While the trustee almost always has the legal titie, in exceptional circumstances it is also possible that the trustee has equitable title: see *Waters' Lavi of Trusts,* at p 365, noting the case of *Carter v Carter* [1969] 70 WWR 237 (BCSC).

[62] Back home, it is beneficial to refer to our decision in the case of *Loo Hon Kong v Loo Kim Lim* [2004] 4 CLJ 1. In that case, Gopal Sri Ram JCA (as he then was) made the following observation as to the circumstances and the limit of the application of the resulting trust:

> The Question of Law
>
> (i) Resulting Trust
>
> The question of law that arises on the facts is whether the plaintiff can compel the defendant to transfer the legal title to the land to him. This is an equally straightforward issue. The law cn the point is not in doubt. Neither is there any difficulty in applying it to the facts here.
>
> The plaintiff having paid the entire purchase price for the land, the act of registering the land in the defendant's name merely vested the nominal legal ownership in the latter. The beneficial ownership results to the plaintiff. This is because the relationship between the parties here does not come within one of the special categories recognised by equity as creating a presumption of advancement in favour of the holder of the legal title.
>
> The very limited and well — established circumstances in which a resulting trust may arise were dealt with by Lord Browne — Wilkinson in *Westdeutsche Landeshank Gimzontrale v Islington London Borough Council* [1996] AC 669 708. He said:
>
> > Under existing law a resulting trust arises in two sots of circumstances: (A) where A makes a voluntary payment to B or pays (wholly or in part) for the purchase of property which is vested either in B alone or in the joint names of A and B, there is a presumption that A did not intend to make a gift to B the money or property a held on trust for A (if he is the suit; provider of the money) or in the case of a

joint purchase by A and B in shares proportionate to their contributions. It is important to stress that this is only a presumnton. which presjmption is easily rebutted either by the counter — presumption of advancement or by direct evidence of As intention to make an outright transfer; see *Underhill and Hayton* pp 317H, *Vamtervell v IRC* [1967] 1 All ER 1 at 8; [1967] 2 AC 291 at 312ff and *Re Vandervel's Trusts (No 2). White v. Vandervell Trustees Ltd* [1974] 1 All ER 47 at 63ff; [1974] Ch 269 at 288ff. (B) Where A transfers property to B an express trusts, but the trusts ceclared dc not exhaust the whole beneficial interest: ibid and *Berdays Sank Ltd v Quistclose Investments Ltd* [1968] 3 All ER 651; [1970] AC 567. Both types of resulting trust are traditionally regarded as examples cf trusts giving effect to the common intention of the parties A lesuting trus: is not imposed by law against the intentions of the trustee (as is a constructive trust) but gives effect to his presumed intention. Megarry J in *Re Vendervell's Trusts (No 2)* suggests that a resulting trust of type (B) docs not depend on intention but operates automatically, am not convinced that this is right. If the settlor has expressly, or by necessary implication abandoned any ceneficial interest in the trust property, there is in my view no resulting trust: the undisposed — of equitable interest vests in the Crown as bona vacantia see *Re West Sussex Constabulary's Widows Children) and Bonevolet (1930) Fund Trusts* [1970] 1 All ER 544; [1971] Ch 1.

We pause to emphasise — if emphasis is required — that the categories of oases in which a resulting trust may arise am closed and no new category may now be admitted. In particular we would reject — as did the House of Lords in *Westdeutsche Landesbank* — the suggestion by Professor Peter Birks (*'Restitution and Resulting Trusts' in Equity and Contemporary Legal Developments* p 335 at 360) that a resulting trust should arise wherever money is paid under a mistake or when money is paid on a condition which subsequently fails.

The facts of the present instance clearly fail wilhin the second limb of category (A) of the Browne-Wilkinson formula. For, this is a case of a purchase in the name of another with no intention of making a gift of the property. We would for good measure add that it is not the instant defendant's pleaded case that although the property was paid for by the plaintiff, he intended to make a gift of it to the defendant. The defendant both in the court below and before us. put forward only one ground, namely, that he had paid pari of the purchase price, an assertion which, as we have already said, does not stand up to close scrutiny.

[63] Guided by the principle of law decided in those authorities cited and upon perusing the appeal records, we agree with the counsel for the defendants' submission. From the pleaded facts as analysed at paras [30]–[36] above, it clearly shows that the plaintiffs' claim is based on PTK's assurance that CMS and all the siblings would be provided for after his death from the dividends of the shares and from the returns of the assets that PTK had inherited and accumulated during his lifetime. The plaintiffs have not pleaded that the assets would result or revert to PTK and they also have not pleaded that the beneficial interest would remain with PTK. Instead, the plaintiffs in their pleaded facts and confirm by their testimonies in court that PTK had parted with the

beneficial interest and to be vested to CMS as well as to all the siblings equally. They claimed that the defendants are their trustee as opposed to be a trustee for the PTK or CMS as in the case of resulting trust.

[64] As to the burden of prove, we are of the opinion that the plaintiffs failed to fulfil the requirement to enable the learned JC to presume that the resulting trust existed. The material evidence adduced by the plaintiffs as quoted at paras [43]–[47] above show that there was an express intention by PTK to transfer the disputed properties to CMS, in order to avoid heavy estate duty. Then, by the same reason CMS transfer the disputed properties to the defendants to be held as trust properties for the benefit of the plaintiffs.

[65] Therefore, we find that the plaintiffs failed to establish their claim based on resulting trust. The learned JC fundamentally erred in assuming that a resulting trust had existed and allowed the plaintiffs' claim based on the plaintiffs pleaded facts the evidence adduced before her.

[66] Next, we move to the issue of constructive trust. It is trite that a constructive trust is a trust imposed by operation of law and it will override the intention of the parties involve. In *Perbadanan Kemajuan Pertanian Selangor v JW Properties Sdn Bhd* [2017] MLJU 1107; [2017] 8 CLJ 392, the Federal Court defined constructive trust as follows:

> [57] It is to be noted that a constructive trust is a creature of equity. By its very nature, whether or not a constructive trust arises in the absence of the consent at the State Authority to transfer the land is very much dependent on the facts cf the case. As regards the present case a relevant factor to consider is whether there was any unconscionable conduct on the part of the appellant which would attract the intervention of equity
>
> [58] From decided case authorities it has been established as a principle of law that constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of the property (usually but not necessarily the legal owner) to assert his own beneficial interest in the property and deny the beneficial interest of another. (See the cases of (1) *Takako Sakao v Ng Pek Yuen & Anor* [2009] 6 MLJ 751; [2010] 1 CLJ 331 (FC) and (2) *Veliasamy Pennusamy & Ors v Gurbaufiart Singh Bagawart Singh & Ors.* [2010] 5 MLJ 437; [2012] 2 CLJ 712 (CA)).
>
> [59] It has also been held that a constructive trust is a trust which is imposed by equity in order to satisfy the demands of justice and good conscience without reference to any express or presumed intention of the parties. (See the case of *Hassan Kadir & Ors, v Mahomed Moidu Mohamad & Anor* [2011] 5 CLJ 136 (FC)). A constructive trust is a remedial device that is employed to prevent unjust enrichment, It has the effect of taking the title to the property from one person whose title unjustly enriches him and transferring it to another who has been unjustly deprived of it (see the case of *Tay Choo Foo v Tengku Mohd Saad Tengku Mansur & Ors And Another Appeal* [2009] 1 MLJ 289; [2009] 2 CLJ 363 (CA)).

Recently, in *Ng Hoo Kui & Anor v Wendy Tan Lee Peng, Administrator of the Estates of Tan Ewe Kwang, Deceaseds Ors* [2020] 12 MLJ 67; [2020] 10 CLJ 1 the Federal Court explained the concept of constructive trust as follows:

> [111] It is trite law that the intention to create a trust is applicable in situation of express trusts and not in constructive trusts. Constructive trust are trusts that may be implied in the absence of any declaration/intention of a trust, where the trustee has induced another to act to their detriment they would acquire a beneficial interest in the land/property. A characteristic feature of this trust does not owe its existence to the parties' intention, but by operation of law. In *Takako Sakao v Ng Pek Yuen* [2009] 6 MLJ 751; [2010] 1 CLJ 361, it was held that:
>
> > A constructive trust is imposed by law inespective of the intention of the parties. And it is imposed only in certain circumstances, eg where there is dishonest, unconscionable or fraudulent conduct in the acquisition of property.
>
> What equity does in those circumstances is to fasten upon the conscience of the holder of the property a trust in favour of another in respect of the whole or part thereof.
>
> [112] Constructive trust is viewed as a device under which equity will intervene so as to create a trust relationship between the parties in order to make a person accountable for the trust to prevent any unfairness or injustice. Equity will impose obligation on the defendant to hold the property for the benefit of another.

In the case of *Datuk M Kayveas v See Hong Chen & Sons Sdn Bhd & Ors* [2014] 4 MLJ 64, the Federal Court, inter alia, opined that a constructive trust hinges independently on the unconscionable behaviour of the constructive trustee. At p 80 it was held that:

> [37] Due to the fine line drawn between an express trust and a constructive trust, perhaps a comparison of these two classes of trusts may help give a clearer picture. An obvious difference is that an express trust comes into existence the moment the trust is expressed while for a constructive trust the unconscionable behaviour of the trustee ignites it into existence. Geraint Thomas Alastair Hudson in *The Law of Trusts* (2nd Ed) wrote:
>
> > One significant distinction between an express trust and a constructive trust is that an express trust necessarily comes into existence from the moment at which the settlor declared it, whereas a constructive trust cannot exist but for the unconscionable behaviour of the defendant which brings it into existence; therefore the express trust is brought into existence by the deliberate act of the settler whereas a constructive trust is brought into existence by means of the wrongful act of the trustee Thus, the constructive trust is dependent on the unconscionability of the defendant's actions ...
>
> [38] From the various opinions above it may be construed that a constructive trust arises by operation of law irrespective of the intention of the parties, in circumstances where the trustee acquires property for the benefit of the beneficiary,

and making it unconscionable for him to assert his own beneficial interest in the property and deny the beneficial interest of another. Being bereft of any beneficial interest, and with equity fastened upon his conscience, he cannot transfer any interest to himself let alone a third party. If he does, then a constructive trust comes into existence. An aggrieved party, by equitable remedy, may demand restitution of the property if he has been deprived of his beneficial interest.

[67] On the issue of constructive trust, the counsel for defendants submitted that the plaintiffs failed to plead explicitly the facts or particulars of facts In their pleadings. On this point the counsel for the plaintiffs disagreed. He argued that the issue is clearly reflected in the 'Agreed Issues To Be Tried' that can be found at pp 144–146 *Rekod Rayuan Bahagian* A *Jld* 1. The issue on constructive trust had been agreed upon and the agreed issues to be tried was signed by both the parties and thereafter filed in court for the purposes of the trial. One of the issues to be tried that were unequivocally agreed was:

Alternatively, whether the facts and circumstances in which the assets of their Father were 'acquired, retained and/or dealt with' by the 1st Defendant and 2nd Defendant were unconscionable, and if so, whether a trust [constructive, as a remedy] should be imposed on the asset of their Father, with the 1st Defendant and 2nd Defendant as trustees for all the Siblings.

[68] It is further submitted by the counsel for the plaintiffs that the issue of a constructive trust is also evident from the statement of claim. Based on the declaratory and consequential reliefs sought therein, the plaintiffs' claim is clearly for the imposition of a constructive trust, in their favour. The plaintiffs are claiming that the disputed properties were held on trust on their behalf and their action against the defendants is for the recovery of the trust properties.

[69] From the said arguments, we pick up two issues. First, whether there are proper facts pleaded in the plaintiffs' pleadings to raise the issue of a constructive trust and second, whether the agreed issue listed by the parties in the 'Agreed Issues To Be Tried' bind the parties and the court can make a finding on the issue regardless of the pleaded facts of the parties.

[70] On the first issue, it is trite law that parties bound by their pleadings. Abundance of authorities decided on the issue, Federal Court in the case of *Anjalai Ammal & Anor v Abdul Kareem* [1969] 1 MLJ 22 had made the following observation and had opined that:

There is considerable authority in regard to the purpose and effect of particulars filed pursuant to O 19 r 7A of the Rules of the Supreme Court. At p 31 of *Halsbury* (3rd Ed) Vol 3, the learned commentator has this to say:

A party is bound by his pleadings unless he is allowed to amend them, and he is therefore bound by his particulars, which are, in effect, part of the pleadings under which they are delivered.

A In *Thomson v Birkley* [1883] 47 LTR p 700 Watkin Williams J says:

> The object of particulars is to prevent surprise and to limit and particularise events in order that both parties should come to trial fully prepared for the issues

In *Speding v Fitzpatrick* (1668) 38 Ch D 410 at 413 Cotton LJ says:

B

> The object of particulars is to enable the party asking for them to know what case he has to meet at the trial, and so to save unnecessary expense and avoid avowing parties to be taken by suprise

In *Thorp v Holdsworth* (1876) Ch 637 at 639 Jessel Mr says:

C

> The whole object of pleadings is to bring the parties to an issue and the meaning of the rues of R XIX was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning Of the system is to narrow the parties to definite issues, and thereby to diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.

D

Finally, in *Yorkshire Provident Life Assurance Co v Gilbert & Rivington* [1895] 2 QB 114 at 152 Lindley LJ says:

E

> What is the effect of these particulars? I take it the effect of these particulars is this, that the issues to be tried are limited by these particulars in the first instance. I do not mean to say that leave cannot be obtained to add to the particulars — of course it can; but the moment these particulars are delivered and until some further order is obtained for me delivery of further particulars, the effect of delivering the particulars is to cut down the matters in question in the action to the particulars

F

Therefore, in my opinion, the learned trial judge, in the instant case, had departed from the strict rules of procedure, in deciding the case on an issue not raised in the pleadings and on the assumption of a fact which the appellants were not obliged to call evidence to rebut ...

G

On the same principle of law related to the rule of pleadings, this court in the case of *Pembenaan SPK Sdn Bhd v Jalinan Waja Sdn Bhd* [2014] 2 MLJ 322 has made the following observation:

H

> [24] That classic, authoritative text on the rules of pleadings — Sir Jack Jacob & Ian S Goldrein, *Pleadings: Principles and Practice* — provides four 'objects' Pleadings — their dual object in summary. Pleadings serve a two-fold purpose:
>
> (a) first To inform each party what is the case of the opposite party which he will have to meet before and at the trial; and
>
> I
>
> (b) secondly concurrently to appraise the court what are the issues, the identity of the issues is crucial; not only for the purposes of trial, but also for the purposes of all the pre-trial interlocutory proceedings.
>
> The object of pleadings — in detail

(a) first to define with clarity and precision the issues or questions which are in dispute between the parties and fall to be determined by the court ...

(b) secondly to require each party to give fair and proper notice to his opponent of the case he has to meet to enable him to frame and prepare his own case for trial ...

(c) thirdly to inform the court what are the precise matters in issue between the parties which alone the Court may determine, since they set the limits of the action which may not be extended without due amendment properly made ...

... in *Blay v Pollard and Mom's* Scrutton LJ said:

Cases must be decided on the issues on the record; and if it is desired to raise other issues they must be placed on the record by amendment. In the present case the issue on which the judge decided was raised by himself without amending the pleadings, and in my opinion he was not entitled to take such a course ...

(d) fourthly to provide a brief summary of the case of each party, which is readily available for reference and from which the nature of the claim and defence may be easily apprehended, and to constitute a permanent record of the issues and questions raised in the action and decided thereon so as to prevent future litigation upon matters already adjudicated upon between the litigants or those privy to them ... (at pp 3–4 of the text (1990 Ed).

[25] As evident from the passage above, not only are the immediate litigants bound by the rules of pleadings, so is the court. The Court itself is as much bound by the pleadings of the parties as they are themselves It is not part of the duty or function of the Court to enter into any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings. Indeed, the Court would be acting contrary to its own character and nature if it were to pronounce upon any claim or defence not made by the parties. To do so would be to enter the realm of speculation ... (*Esso Petroleum Co Ltd v Southpoti Corporation* [1956] AC 218).

[26] A decision based on an unpleaded case will as a rule occasion a failure of natural justice and will be liable to be set aside on appeal. It denies the litigant, the right to present his case fully before the judge on the impleaded issue before the decision is made by the court. A corollary to this principle is the following: it is not the duty of the court to make a case for a party when that party does not raise, or wish to raise, a point in the litigation. *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196 states the position very clearly thus:

A judgment should be based upcn the issues which arise in this suit, if such a judgment does not dispose of the questions as presented by the partes it renders itself liable not only to grave criticism but also to a miscarriage of justice It becomes worse and is unsustainable if it goes outside the issues. Such a judgment cannot be said to be in accordance with the law and the rules of prccedure.

We also refer to the authority cited by the counsel for the defendants in the case of *Iftikar Ahmed Khan (as the executor of the estate for Sardar Mohd Roshan Khan, deceased) v Perwira Affin Bank Bhd (previously known as Perwira Habib Bank Malaysia Bhd)* [2018] 2 MLJ 292 where the Federal Court held that:

> [27] It is settled law that parties are bound by their pleadings and are not allowed to adduce facts and issues which they have not pleaded: *Samuel Naik Siang Ting v Public Bank Bhd* [2015] 6 MLJ 1, *State Government of Perak v Muniandy* [1986] 1 MLJ 490, *Veronica Lee Ha Ling & Ors v Maxisegar Sdn Bhd* [2011] 2 MLJ 141; [2009] 6 CLJ 232. In *Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428; [1991] 1 CLJ Rep 239 it was held that where a vital issue was not raised in the pleadings, it could not be allowed to be gianted and to succeed on appeal. A decision based on an issue which was not raised by the parties in their pleadings is liable to be set aside: *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152. In the *Chartered Bank v Yong Chan* [1974] 1 MLJ 157 the Federal Court set aside the judgment of the trial judge as it was decided on an issue not raised on the pleadings. In that case the trial judge erred in concluding that the pleadings included a claim for breach of contract as well as a claim for libel.

[71] Back to the plaintiffs claim against the defendants, if the plaintiffs are pursuing their claim or their relief based on a constructive trust, they must provide the material particulars that can show the elements of a constructive trust in their pleadings. Federal Court in the case of *Instantcolor System Sdn Bhd v Inkmaker Asia Pacific Sdn Bhd* [2017] 2 MLJ 697 had held that:

> [60] *It is a cardinal rule that parties are bound by their pleadings and are not allowed to adduce facts and submissions on matters which they had not pleaded*. Cases must be decided on the issues on the record; and if it is desired to raise other issues they must be placed on the record by amendment (see: *State Government of Perak v Muniandy* [1986] 1 MLJ 490; *Anuar bin Mat Amin v Abdullah bin Mohd Zain* [1989] 3 MLJ 313; and *Blay v Pollard and Morris* [1930] 1 KB 628).
>
> [61] *The issues of constructive trust, fraud and fraudulent breach of trust as raised by the plaintiff are vital issues in bringing into play the exceptions to limitation period under s 22 of the Act. They must be specifically pleaded in the pleadings*, failing which, as rightly held by the Supreme Court in *Leo Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428, they 'could not be allowed to be argued and to succeed on appeal'.
>
> [62] The plaintiff's counsel argued that even though the plaintiff did not plead 'fraud', it had pleaded 'breach of fiduciary duty as against the first defendant'. As regard to the second defendant, the plaintiff's counsel contended that the second defendant was the product and the result of the breach of fiduciary duly caused by the first defendant, as stated in paras 7 and 8A of the amended statement of claim and once the first defendant wnom the plaintiff claimed to be a constructive trustee, caused the incorporation of the second defendant, it means that the second defendant is also a constructive trustee.
>
> [63] We have perused the entire amended statement of claim filed by the plaintiff, we find that the issues in question were not pleaded by the plaintiff. *To merely plead 'breach of fiduciary duty' is too vague and too general. The pleadings on this issue must*

not be left vague and undefined They ought to be pleaded with distinctness and precision (see *Dow Hager Lawrance v Lord Norreys and others*).

[64] Pleadings must specifically and expressly state the facts and not the law (see: *Song Lian Chye & Ors v Tai Kian Cheong t/a Tai Kian Cheong & Co* [1983] 2 MLJ 222 (FC)). *If the plaintiff intends to rely on the exception to limitation period under s 22 of the Act, material factual elements as to the existence of a trust, trust property, existence of fiduciary duty, fraud and fraudulent breach of trust must be pleaded*. In *Renofac Builder (M) Sdn Bhd v Chase Perdana Berhad* [2000] MLJU 752; [2001] 2 AMR 1639 the court took the view that all material facts must be pleaded in the statement of claim and *failure to plead one material fact is fatal*. In short, particulars of fraud and breach of trust must be pleaded. (Emphasis added.)

[72] From the facts pleaded as we had narrated at paras [30]–[36] above, we have to stress it again that the plaintiffs' case is premised on a purported oral assurance by PTK or CMS that the siblings would be provided for after PTK's or CMS's passing from the cash, dividends from the shares and returns from the assets that PTK had inherited and accumulated in his lifetime. In order to avoid substantial estate duty which would be imposed on PTK's cash, shares and assets upon his passing, all the disputed properties were transferred to CMS, P2, D1 and D2 to be held on trust for all the siblings equally as pleaded in paras 8–9 of the statement of claim, It seems that the plaintiffs' claim was based on a direct trust and there are no specific particulars of facts which would support a case of constructive trust. On this issue, we tend to agree with the counsel for defendants' submission that the plaintiffs failed to plead:

(a) the issue of a constructive trust;

(b) that the transfers of the disputed properties by PTK or later by CMS to the defendants was done in a way which was unjust to the other siblings;

(c) that the defendants as the sons of the family, stood in a fiduciary relationship to take care of the younger siblings;

(d) that regardless of the intention of PTK, there was an understanding or promise made by the defendants to share the disputed properties with the other siblings; and

(e) how or in what way it would be unconscionable for the defendants to retain proprietorship of the disputed properties transferred to them even though the transfers were duly and properly done.

[73] Related to the same issue, we are of the opinion that by merely praying for a declaratory and consequential relief as a remedy in the statement of claim without particularising the material facts to support a claim on constructive trust, is insufficient to fulfil the requirement of the law on pleadings. Obviously, from their pleadings, the plaintiffs failed to lay down a clear and precise issues of constructive trust so as to give the defendants a fair and a

proper notice of the case that they have to meet to enable them to frame and prepare their case for trial and more so, to inform the court what are the precise matters in issue between the plaintiffs and the defendants which the court has to determine.

[74] On the second issue, that is on the 'Agreed Issues To Be Tried', as argued by the counsel for the plaintiffs to be binding on the defendants, we find no merit in the said argument. An issue to be tried whether agreed or not by the parties remains as an issue as the name suggests. It cannot be the decider of the fact in question. Parties are required to detailed out the relevant facts in their pleadings and parties are bound by those particulars pleaded. Parties have to make amendment to their pleadings if they found any shortcoming in the particulars pleaded. In short, parties could not rely on agreed issues to be tried to establish or to prove their case. Agreed issue or issues cannot circumvent any shortcoming in the pleadings.

[75] As to the evidence adduced before the court, we agree with the counsel for defendants' argument that there is no clear and unequivocal evidence to support the establishment of a constructive trust especially when there is an outright transfer of property from PTK to CMS or to the defendants. The contemporaneous documents, that is the transfers form of the disputed properties clearly show that the direct transfers were either for a certain consideration or for 'love and affection'. As a matter of fact, the plaintiffs took a stand that those transfer documents were valid and they are not disputing it. Even though P2 was trying to say that PTK would not have transferred the disputed properties in her testimony during cross-examination, the counsel for the plaintiffs had interrupted a few times to state otherwise (see *Rekod Rayuan Bahagian* B *Jld* 2A, at p 364):

> GST: You see this staring at you, dated 08.10.1970, about a week before your father passed away and you suspect this is a lie and you took no steps to —
>
> HOON: I believe my father would not have transferred if it was not so urgent to avoid the death duty.
>
> GST: Madam, let the Court decide all that.
>
> HOON: My father did, before he died, he would not have transferred.
>
> YCM: *Yang Arif. this is not really an issue because we're not disputing the transfer. The whole case, we're not disputing the transfer.*
>
> YA: Then, you see Mdm Tan —
>
> YCM: *Yes, we're not disputing the transfer.*
>
> YA: That's why you have to answer the question.
>
> YCM: Yes.

YA: The counsel is asking you based on the document.

YCM: Based on the document.

YA: So what you believe, your opinion, you have to reserve it for later.

YCM: *Yes but we're not disputing the transfer. None of this transfer -*

GST: Yang Arif I'm trying ta establish the man's condition at about that time. That's what I'm trying to establish.

YCM: *Yes, we're not disputing the father transferred it out. Nothing is, all these positions are not disputed.*

YA: So the witness should answer accordingly.

YCM: *Yes, that is why we did not dispute all these documents. Those documents were provided.* (Emphasis added.)

[76] As we had observed before, the plaintiffs through P2 had abandoned their claim on the issue of fraud (see para [53] above) and the counsel for the plaintiffs had reaffirmed the plaintiffs stand that they were not disputing the transfer of the disputed properties from PTK to CMS or to the defendants. Then, it is correct to say that the transfers of the disputed properties were properly executed and therefore valid. Consequently, the defendants have an indefeasible title to the disputed properties under the National Land Code. In the absence any express intention to create a trust by PTK, what is left is merely a familial moral obligation on the part of the defendants to provide for the plaintiffs. This is consistent with the basis of the plaintiffs' claim that a trust was created in their favour based on the oral assurance by TPK that 'they would be provided for after his passing from the cash, dividends from the shares and returns from the assets' that TPK had inherited and accumulated in his lifetime.

[77] From evidence adduced, it is not disputed that the plaintiffs' wellbeing was taken care of after PTK or CMS pass away. Over the years, they have all grown up to be educated and established in their respective careers with families of their own. P1 was a lecturer with a degree in Business Administration and a diploma in education, P2 completed her HSC and was running a hair dressing business and P3 was a law graduate and once a practising lawyer. As matter of fact, in 1973, the year that CMS passed away the plaintiffs were already 26, 22 and 21 years old respectively and they were hardly 'school-going children' then.

[78] Next, there is another pertinent point raised by the counsel for the defendants that attract our attention, that is CMS's conduct. In their pleadings, the plaintiffs averred that CMS was a beneficiary as well as a trustee. However, CMS contemporaneous conduct when the alleged trust was purportedly

created up to the time when she passed away in 1973 did not reflect the fact that she was a trustee. The scenario is, if CMS hold the properties on trust for all the siblings, no need for her to restart the alleged scheme devised by PTK to avoid the estate duty. All that she was required to do is to hold the assets under her name for her children, since she was only carrying out the intention of the PTK as a trustee.

[79] Furthermore, CMS had held the properties for three years since PTK passed away. As a trustee, she could have distributed the assets equally amongst her children, if that was what the intention of PTK. Instead, she had on 1 June 1972 transferred four disputed properties to the D2 on the basis of 'love and affection'. From CMS's conduct, the only inference that can be made is that the transfer of the assets by the CMS was an outright inter vivos gift, and not subject to a trust as alleged by the plaintiffs.

[80] Finally, the learned JC did make a specific finding on an admission by D1 through an email dated 3 March 2017 sent to P1 as can be seen at paras [62]–[63] of the GOJ as follows (see *Rekod Rayuan Bahagian* A *Jld* 1, pp 46–48):

> [62] This was especially in light of an email dated 3 March 2017 from the first defendant to the first plaintiff (exhibited at pp 15–16 of Part B of the common bundle of documents) which reads:
>
> > You are correct, we are in our twilight years and I do not need to put up with any of these lies anymore. In Tan Hak Heng (THH), Meng [the second defendant] has gone back on his word regularly; he has taken money from me company and caused great loss to all involved. The only reason why they hava not reported him is out of respect for me ...
> >
> > ... Why is it that when he [Meng] agrees to share Saleng land, he quickly takes a multi-million ringgit loan using the Saleng land as collateral? This Saleng land which was put in trust in Meng's name was to be shared amongst all of us. It would be more than enough for all of us to have comfortable lives ...
> >
> > I am not against SH [the second plaintiff] having a comfortable life. In order to help her, all I wish for is that the accounts of Hong Meng (HM) to be sorted out and updated. As Li is aware HM's last audited account was submitted in 2001 which showed it was losing money: and the mess that has been created by Meng not only affects HM but also I have to pay hefty fines for late submission. I feel without even resolving HM accounting mess and it was a losing concern before, we do not know the quantum which can be dispensed. Meng has taken another 300k from HM. He and Li have signed for the cheques made out to me and to him. Never mind about the millions he has borrowed using Saleng land as collateral or the monies he has taken from HM and THH ... Once the accounts are done and SH has enough to live out her life, I would like HM to be dissolved. After that, I want nothing more to do with SH or Meng again.
> >
> > If you can understand why I am so saddened, then I would like you to come to

visit, for me to spend quality time with you. If you do come, please do not bring the matter up again. In retrospect: I should have never got any of the inheritance put in Meng's name. I thought it was the best decision at the time as I wanted to give Meng some sense of responsibility and I am an academic not used to dealing with financial and legal matters. But I never thought it would bring so much shame and sadness to me.

If you wish to further help SH or get back your share of the Saleng land, you all may feel free to proceed on your own. If you wish to proceed with litigation, Meng and 6th Uncle did state under oath, during a court case between THH and Keng Leng, that they held the shares and property in trust. The other families have all shared their respective family share of Saleng land equally amongst theh siblings. You should now know after several previous meetings that it is no fault of mine we do not have any share of Saleng.

[63] The letter above is of utmost importance as it contains admissions and acknowledgements by the first defendant of the plaintiffs' claim, and clearly corroborates the plaintiffs' assertion that the assets of the deceased were in actual fact held in trust.

[81] The question to ask is, can the so-called admission by D1 be considered as prima facie prove to corroborates the plaintiffs claim on the existence of a trust? Our considered answer to the question is 'no'. The reason is, in the true contacts of the said statement, D1's is referring to the Saleng Land, a property owned by D2 not his own property. Therefore, D1 is not in the position to suggest that Saleng Land is a trust property.

[82] To conclude, based on the plaintiffs' pleaded facts and the evidence adduced, we find that the learned JC erred in law and in fact when she made a finding that the plaintiffs had proven their case on a constructive trust.

[83] Next, the learned JC in her decision make a finding that Hong Meng Sdn Bhd is also a subject of a trust. She found out that Hong Meng Sdn Bhd is a family company and THH Holdings is an extended family company. Consequentially, she ordered that the defendants to transfer 20,000 shares of Hong Meng Sdn Bhd to each plaintiff. She also ordered that the D1 to account and to return the sum of RM1,482,000 to Hong Meng Sdn Bhd being the proceeds from the sale of the Skudai Land. Besides that, the defendants were ordered to refund the total advances of RM600,000 and RM750,000 taken from the family company, Hong Meng Sdn Bhd.

[84] Upon perusing the GOJ, we find that there is no reason given as to why those shares were held on trust by the defendants alongside the other immovable disputed properties. From the evidence, it is agreed that Hong Meng Sdn Bhd was incorporated in 1978, some eight years after the death of PTK. Even though the plaintiffs claimed that the PTK's business interest in the

company was converted into shares from extended family business, THH Holdings, they failed to produce any evidence to support their averment. None of the plaintiffs know of any familial arrangement involving the purported extended family business which gives the plaintiffs the right to stake a claim in Hong Meng Sdn Bhd. As matter of fact, the plaintiffs were 31, 27 and 26 years old respectively in 1978, the year Hong Meng Sdn Bhd was incorporated and they were no longer 'vulnerable school-going children' then.

[85] The plaintiffs also failed to show any documentary proof, whether in the form of a shareholders' agreement, trust deed or otherwise, to show that Hong Meng Sdn Bhd was a product of an agreement between the siblings when it was incorporated. Besides the fact that P3 was appointed a director in 2016, the plaintiffs failed to produce any contemporaneous evidence to show that they have contributed to Hong Meng Sdn Bhd in what so manner, whether in the form of capital injection or other contributions.

[86] As such, we are of the opinion that the learned JC failed to take in consideration the fact that the plaintiffs have not proven their case against the defendants in staking a claim for the shares of Hong Meng Sdn Bhd. No facts and particulars were pleaded to support the plaintiffs' contention that Hong Meng Sdn Bhd is legally a family company. Furthermore, it is trite that a company is a separate legal entity, distinct from its shareholders or directors. Even if a company is run by the members of a family, the ownership of a company limited by shares is determined by its shareholding and not by other means. From the undisputed fact, the defendants are the only contributories of Hong Meng Sdn Bhd. Thus, there is no reason for the learned JC to make an order to apportion Hong Meng Sdn Bhd in five equal shares among the siblings.

[87] As to the refund of the proceed of Skudai Land by D1 and the refund of the two advances ordered by the learned JC to be paid by the defendants, we agree with the counsel for the defendants that the learned JC had committed a fundamental flaw when she disregard the provisions in the Companies Act 2016 and established principles of company law. Should there be any wrong committed against a company, only the company can initiate an action to redress the wrong doing. In our decision in the case of *Pioneer Haven Sdn Bhd v Ho Hup Construction Co Bhd & Anor and other appeals* [2012] 3 MLJ 616, we did refer to the legal position in relation to the cause of action which may be brought for any wrong doing against a company as set out by Lord Millet in *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1 at p 61 as follows:

> A company is a legal entity separate and distinct from its shareholders. It has its own assets and liabilities and its own creditors. The company's property belongs to the company and not to its shareholders. If the company has a cause of action, this is a legal chose in action which represents part of its assets. Accordingly, where a

> company suffers loss as a result of an actionable wrong done to it, the cause of action is vested in the company and the company alone can sue. No action lies at the suit of a shareholder suing as such, though exceptionally he may be permitted to bring a derivative action in right of the company and recover damages on its behalf: see *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204 at p 210.

Earlier, in *Abdul Rahim bin Aki v Krubong Industrial Park (Melaka) Sdn Bhd* [1995] 3 MLJ 417 we made the following observation:

> We begin with the rule in *Foss v Harbottle* (1843) 67 ER 189. The rule has two limbs. The first limb of the rule — and the present appeal has nothing to do with its application — is that a court will not interfere with the internal workings of a corporation upon a matter which is capable of being ratified by a majority of shareholders present and voting at a general meeting of the company. The content of the first limb, although it derives its name from the case just cited, in truth finds its origins in the earlier decision in *Mozley v Alston* (1647) 41 ER 833. The modern restatement of the rule is to be found in the judgment of Harman LJ in *Bamford v Bamford* [1970] Ch 212; [1969] 1 All ER 969; [1569] 2 WLR 1107
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> The second limb of the rule is of much wider purpose and is universal in its application. It is eased upon the doctrine that only he who has been injured may sue. Translated into company law, the proposition may be stated thus. If a wrong has been done to a company, then it is the company which is the proper plaintiff in an action brought to redress the injury. An individual shareholder or even a group of shareholders forming a minority on the floor of a general meeting of the company have no locus standi to bring an action to remedy a wrong done to a company. See *Prudential Assurance Co Ltd v Newman Industries Ltd (Uo 2)* [1982] Ch 204; [1982] 1 All ER 354; [1982] 2 WLR 31.

[88] Therefore, the plaintiffs who are alien to Hong Meng Sdn Bhd are not in any position can make a claim on behalf of the company. They have no locus standi to bring any action for or on behalf of the company against the defendants to claim the refund of the advances paid to them or to make a claim against D1 for the refund of the proceed of Skudai Land. Even if the plaintiffs have an interest as contributories in Hong Meng Sdn Bhd, they still need to bring a derivative action on behalf Hong Meng Sdn Bhd against the defendants and not in personal capacity. Therefore, learned JC erred in allowing the plaintiffs' claim for the defendants to repay Hong Meng Sdn Bhd.

[89] Based on the pleaded facts and the evidence adduced by the plaintiffs, we find that the plaintiffs failed to discharge the initial burden of proving a prima facie case in their favour. In other words, the plaintiffs failed to discharged the legal burden to prove the existence of any relevant facts to show that the disputed properties are trust properties and the defendants are their trustees. Thus, the evidential burden is not yet shifted to the defendants to adduce rebutting evidence. We have to answer the first issue and the second

issue, that are on the issue of pleading and the issue of evidence in favour of the defendants.

[90] Based on the said finding, we have to answer the third issue raised by the defendants' counsel, that is the issue of adverse inference drawn by the learned JC against the defendants, in the negative. In her judgment, the learned JC had condemned the defendants' action of not calling D2 and one Mr P Kamalanathan, the lawyer who did the transfer of the disputed properties, as their witnesses to give evidence. In paras [47]–[48] GOJ, the learned JC made the following conclusion (see *Rekod Rayuan Bahagian* A, at p 41):

> [47] As such, an adverse inference was drawn against the defendants for failing to produce both the second defendant and Mr P Kamalanathan.
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> [48] The refusal of the second defendant to be cross-examined coupled with the adverse inference drawn, and my assessment and evaluation of the plaintiffs and first defendant, as well as the evidence adduced by them, have cemented the truth of the plaintiffs' testimony.

[91] With respect, we find that the learned JC was plainly wrong in her approach to draw an adverse inference against the defendants for the non-production of the D2 and Mr P Kamalanathan. Her Ladyship had disregarded the important principles of evidence law, that is the law on the burden of prove especially in cases when a trust is sought to be established. An adverse inference can only be drawn if the plaintiffs have successfully established their case and if the defendants fail to call relevant witness or witnesses to rebut the plaintiffs establish case. See Federal Court decision as submitted by the counsel for defendants in *Keruntum Sdn Bhd v The Director of Forests & Ors* [2017] 3 MLJ 281.

[92] Finally, we will deal with the fourth and final issue raised by the counsel for the defendants, that is question of law on the issue of laches and limitation. According to the pleaded facts, especially in paras 8 and 9 of the statement of claim, the plaintiffs knew about the existence of the alleged trust over the disputed properties since they were transferred to either to CMS or the defendants circa in 1970. The plaintiffs in their testimonies also acknowledged the fact that they knew about the trust long before they filed the action against the defendants.

[93] P11 when cross-examined admitted that she knew about the trust in 1970 and had asked for accounts of the trust since year 1998 (see *Rekod Rayuan Bahagian* B *Jld* 2A, at pp 195 and 217 respectively). P2 said that she had asked for accounts of the disputed properties way back in 1970 but she was satisfied when she was told that she would be taken care of by D1 and she suspected that there was a breach even before year 2005 (see *Rekod Rayuan Bahagian* B *Jld* 2A.

at p 301 and at pp 308–309 respectively). Meanwhile, P3 who was legally qualified and did practise law, agreed that she knew of the trust upon her graduation in 1975 and had asked the defendants about the said trust properties. She also admitted that she already knew about the breach way back in 2005 and had asked for the account in 1976 but was not given by the defendants (see *Rekod Rayuan Bahagian* B *Jld* 2A, at p 335, at p 380 and at p 414 respectively).

[94] From the plaintiffs' own testimony, it is clear that P1 and P2 knew about the alleged trust in 1970 and P3 knew later, in 1975. They had been asking for the accounts over the years and did not received any response from the defendants, They did not take any action whether to file an action or even to lodge a caveat to secured their claim over the disputed properties. Instead, they have waited for about half a century to commence the action against the defendants purportedly on the reason that they were reluctant to act as they were siblings.

[95] The law on the doctrine of laches is well settle. This court in *Tung Kean Hin & Anor (as executor for the estate of Tung Leong Geok, deceased) v Yuen Heng Phong (as administrator for the estate of See Ngan Sang @ Lee Ngan Sang)* [2019] 2 MLJ 334 had succinctly summarised the doctrine as follows:

> [37] For laches to be raised, there must be delay amounting to acquiescence (see: *Cheah Kim Jong & Anor v Taro Kaur* [1989] 3 MLJ 252; [1889] 1 CLJ Rep 378; [1999] 2 CLJ 791; *Foo Holdings Sdn Bhd & Anor v Foo Choon Ying @ Foo Chun Yin (executor for the estate of Chen Choi Thai, the deceased)* [1913] MLJU 1638; [2013] 1 LNS 908; *Archibald v Scully* [1861] IX HLC 360). The doctrine of laches JS based on the maxim that 'equity aids the vigilant and not those who slumber on their rights. Lord Selbome succinctly explained in the landmark case of *Lindsay Petsoleum Co Hard* (1874) LR 5 PC 221:
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> > But in every case if an argument against relief which otherwise would be just is founded on mere delay, that delay of course not amounting to a bar by any Statute of Limitations, the validity of that defence must be tried upon principles substantially equitable Two circumstances always important in such cases are the length of the delay, and the nature of the acts done durng the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other so far as relates to the remedy.
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> [38] Edgar Joseph Jr J in the case of *Alfred Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202; [1989] 1 CLJ 693 explained the doctrine of laches:
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> > Laches is an equitable defence implying lapse of time and delay in prosecuting a claim. A court of equity refuses its aid to a stale demand where the plaintiff has slept upon his rights and acquiesced for a great length of time. He is then said to be barred by laches In determining whether there has been such a delay as to amount to aches the court considers whether there has been acquiescence on the plaintiff's part and any change of position that has oocurrec on the part of the

A defendant. The doctrine of laches rests on the considerate on that it is unjust to give a plaintiff a remedy where he has by his conduct done that which might fairly be regarded as equivalent to a waiver of it or where by his conduct and neglect he has, though not waiving the remedy put the other party in a position in which rt wauld not be reasonable to place him the remedy were afterwards to B be asserted: 14 *Halsbury's Laws of England* (3rd Ed) paras 1151–1182. Laches has been succinctly described as 'inaction with one eye's open.

[39] The doctrine of laches is based on the Latin maxim *vigilantibus non dormientibus jura subveniunt* (the law serves the vigilant, not those who sleep). It is a defence of an equitable claim based on the length of time the plaintiff has allowed C to lapse before Commencing proceedings. Similarly, in the appeal before us, we are of the considered view that His Lordship erred when he failed to give due consideration to the fact that the plaintiff had slept upon her alleged rights and interest over the property, if any, and had not taken any steps upon the discovery of the alleged forgery only deciding to commence this action in 2014. No reason was D given for the delay in commencing action, an inaction with one eye's open so to speak.

[96] We further refer to the rational of the doctrine of laches given by the Australian Federal Court in the of in *Lewski v Australian Securities & E Investments Commission Vid 752 of 2014* (2016) 337 ALR 1 at pp 73–74 as cited by the counsel for defendants as follows:

[262] Then there is another aspect of the late commencement of the proceedings that also needs to be kept in mind. As alluded to already, there was a significant lapse of time since the relevant events and the trial of the proceedings. Undoubtedly, F '[w]here there is delay the whole quality of justice deteriorates': *R v Lawrence* [1982] AC 510; [1981] 1 All ER 974; 73 Crim App Rep 1 at 517 per Lord Hailsham LC. As McHugh J commented in *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541; 139 ALR 1 at 551:

G As the United States Supreme Court pointed out in *Barker v Wingo* 'what has been forgotten can rarely be shown'. So, it must often happen that important, perhaps decisive, evidence has disappeared without anybody now 'knowing' that it ever existed. Similarly, it must often happen that time will diminish the significance of a known fact or circumstance because its relationship to the cause of action is no longer as apparent as it was when the cause of action arose. A H verdict may appear well based on the evidence given in the proceedings, but, if the tribunal of fact had all the evidence concerning the matter, an opposite result may have ensued. The longer the delay in commencing proceedings, the more likely it is that the case will be decided on less evidence than was available to the parties at the time that the cause of action arose.

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[97] Back to the appeal before us, we find that the plaintiffs have slept upon their rights and acquiesced for a great length of time. They had slept with one eye's open for about half a century and therefore, it is unjust to consider the plaintiffs' claim for a remedy where they have by their own conduct might fairly

be regarded as equivalent to a waiver or an estoppel.

[98] We also agree with the counsel for defendants that the injustice caused to the defendants cannot be gainsaid. They were brought to court in 2018 when they are already in their twilight years to answer to a claim that purportedly was in existence long time ago, in the 1970s. Memories fade inexorably with time and important witnesses have passed on. It could be difficult to trace important documentary evidence that existed at that point of time. Therefore, is not fair for the learned JC to made an adverse finding against D1 in her judgment for failing to produce evidence of the payment of consideration for the disputed properties transferred to him in year 1970.

[99] We are of the opinion that the learned JC's finding on the defence of laches put forward by the defendants is erroneous. Even if the plaintiffs succeeded in proving their claim that defendants hold the disputed properties on trust on their behalf, we still find that the plaintiffs failed to overcome the hurdle of the doctrine of laches.

CONCLUSION

[100] After having heard the parties at length and upon careful perusal of the records of appeals, we are of the considered opinion that this is a case in which appellate intervention is warranted.

[101] For the foregoing reasons, we unanimously allowed the defendants' appeal with costs. We set aside the High Court judgment. As for costs, we awarded a sum of RM40,000 here and below to the defendants to be paid by the plaintiffs subject to allocator.

Appeal allowed; High Court's judgment set aside with costs of RM40,000 here and below to appellants to be paid by respondents subject to allocator.

Reported by Dzulqarnain Ab Fatar